Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DIMITRIOS KATSOULIS, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a lawful permanent resident of the United States. The court of appeals held that Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), deprived it of jurisdiction to review the final order of deportation against him even though the conduct that gave rise to his deportation order occurred before the enactment of the statute and his appeal already was pending. The questions presented are as follows:

1. Whether Section 440(a) divests the courts of jurisdiction in cases previously pending on the date of its enactment, and, if so, whether it precludes review of final orders of deportation based solely on conduct pre-dating the statute's enactment?

2. Whether deportation of a lawful permanent resident alien by the Attorney General, without the possibility of judicial review by an Article III court, constitutes a deprivation of liberty without due process in violation of the Due Process Clause of the Fifth Amendment, and/or violates the separation of powers doctrine of Article III, § 1 and the Suspension Clause of Article I, § 9 of the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following persons also were parties to the proceedings below (which were consolidated for purposes of oral argument and disposition(:

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Petition For A Writ Of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Dimitrios Katsoulis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-23a) is reported at 109 F.3d 1135. The decision of the Board of Immigration Appeals (App., *infra*, 26a-28a) is unreported. The decision of the immigration judge (App., *infra*, 29a-34a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1997, and a timely petition for rehearing, with suggestion of rehearing *en banc*, was denied by the court of

appeals on May 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276-77 (1996), codified at 8 U.S.C. § 1105a(a)(10), provides as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. Article III, § 1 of the Constitution, U.S. CONST. ART. III, is reproduced in its entirety at App., *infra*, 35a-36a.

STATEMENT

1. Petitioner Dimitrios Katsoulis is a native of Greece who entered the United States as a lawful permanent resident on October 28, 1972, at the age of 10. On June 18, 1993, the INS issued an order to show cause charging petitioner with deportability under Section 241(a)(2)(B)(i) as an alien convicted of a drug-related offense. At the hearing before the Immigration Judge, petitioner conceded deportability, but sought relief from deportation under Section 212(c) of the Act, 8 U.S.C. § 1182(c), based upon the financial dependence of immediate

family members lawfully residing in the U.S., his *de facto* parental relationship with two U.S.-citizen children, and evidence of steady employment and rehabilitation. The Immigration Judge found that petitioner had demonstrated "unusual and outstanding equities" warranting relief from deportation, including his long period of residence in the U.S. and extensive family ties here. The Judge also found that deportation would result in a "fairly significant degree of emotional hardship" to petitioner and his parents due to their ill health and financial dependence upon him. The judge nonetheless denied petitioner's application as a matter of discretion. On March 7, 1996, the BIA summarily dismissed petitioner's appeal "based upon the reasons set forth in the Immigration Judge's decision." __a.

2. On April 5, 1996, petitioner filed a timely appeal with the Seventh Circuit, challenging the BIA's denial of § 212(c) relief on the ground that it abused its discretion. Three weeks later, on April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 440(a) of the AEDPA provides that "[a]ny final order of deportation against an alien who is deportable by reason of having committed" one of a number of specific offenses, "shall not be subject to review by any court." In its Respondent's Brief, the INS argued that the court of appeals lacked jurisdiction to review petitioner's deportation order under § 440(a). Petitioner, in turn, argued that § 440(a) did not apply to cases already pending or to deportation orders based on conduct pre-dating the statute. Petitioner also argued that, if applicable, § 440(a) violated his right to due process by depriving him of his constitutionally-protected liberty without any independent judicial review. Petitioner also argued that granting the Attorney General unfettered authority to initiate, prosecute, adjudicate and enforce final orders of deportation against lawful permanent resident aliens without any scrutiny by Article III

courts would violate the separation of powers doctrine of Article III, § 1 of the Constitution.

The court of appeals rejected petitioner's contentions and held that § 440(a), as a jurisdictional statute, was presumptively applicable to pending cases, and that § 440(a)'s elimination of judicial review over final orders of deportation violated neither the Due Process Clause nor Article III.

As to retroactivity, the court of appeals explained that § 440(a) "does not have an effective date, but because it curtails the jurisdiction of the courts it is presumptively effective on enactment." App., *infra*, 8a (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994)). Applying that presumption, the court noted that the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA) contained safe-harbor provisions delaying the effective date of that statute, while the AEDPA contained no such provision. As the court of appeals explained, IIRIRA "provides for deferred application, an approach that contrasts with the one taken in the AEDPA. It is difficult to avoid the conclusion that the AEDPA covers all cases now in the administrative and judicial pipelines." App., *infra*, 9a. To avoid the application of § 440(a), the court held that an alien would be required "to demonstrate how the change of law pulled the rug out from under his litigating strategy. Such a demonstration is essential—or so we have held when deciding what other provisions of the AEDPA apply to pending cases." App., *infra*, 10a (citing *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd*, 117 S. Ct. 2059 (1997).

Having concluded that § 440(a) was applicable to petitioner, the court of appeals then turned to assessing its scope and constitutionality. As to scope, the court held that § 440(a) does not foreclose judicial review of whether the alien was in fact "deportable by reason of having committed a criminal offense" enumerated in § 440(a):

> When judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists. The doctrine that a court has jurisdiction to determine whether it has jurisdiction rests on this understanding. * * * We think it highly unlikely that Congress meant to enable the Attorney General to expel an alien with a clean record just by stating that the person is a criminal, without any opportunity for judicial review of a claim of mistaken identity or political vendetta.

App., *infra*, 12a. The court held, however, that § 440(a) forecloses judicial review of decisions concerning discretionary relief from deportation. As the court put it, "the right to obtain review, in any court," of "discretionary decisions * * * is gone. That is the point of the legislation. Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review." *Id.* at 19a.

The Seventh Circuit also observed that § 440(a) also precludes judicial review of deportation orders even by way of petitions for a writ of habeas corpus, since "Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals." App., *infra*, 19a. The court acknowledged that "[a]liens may seek the writ that Art. I, § 9 cl. 2 preserves against suspension. But we are reluctant to place weight on its availability, because the Supreme Court long ago made clear that this writ does not offer what our petitioners desire: review of discretionary decisions by the political branches of government." *Id.* at 18a. The court then held that "[a]lthough 28 U.S.C. § 2241 offers an opportunity for collateral attack more expansive than the Great Writ preserved in the constitution," IIRIRA § 306(a) "abolishes even review under § 2241, leaving only the constitutional writ, unaided by

statute." *Id.* at 19a. The court then concluded that "[f]or our petitioners, then, the only plausible avenue of review comes via § 106(a). We must decide whether Congress can foreclose that opportunity." *Ibid.*

In addressing petitioner's contention that § 440(a) violates the Due Process Clause, the court of appeals acknowledged "that aliens who have lawfully entered the United States are entitled to due process of law before they may be deported or removed." App., *infra*, 19a-20a (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)). The court also recognized that "[d]ue process requires more as the stakes, and therefore the costs of error, rise. Procedures adequate to adjudicate a parking ticket * * * would not be adequate to adjudicate a claim of right to remain in the United States." *Id.* at 20a (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The court held, however, that due process is provided in deportation proceedings because "[a]n alien is entitled to notice of the charges, to present evidence (and confront adverse evidence), with the assistance of counsel, at an evidentiary hearing before an immigration judge, and to appellate review" to the BIA. *Ibid.* As the court put it, "[t]he fundamental obligations the due process clause places on the government--notice and an opportunity to be heard--have been preserved." *Ibid.* The court also noted that § 440(a) "preserves an independent judicial role in determining whether the alien is deportable. It is only after a person has been determined, by agency and court in concert, to be (i) an alien who is (ii) deportable (iii) by reason of serious crimes that jurisdiction ends." *Ibid.*

The court of appeals also held that the Due Process Clause does not guarantee judicial review of denials of discretionary relief from deportation Citing *Carlson v. Landon*, 342 U.S. 524, 537 & n.28 (1952), and decisions involving the denial of monetary government benefits, the court of appeals concluded

that "Congress need not provide judicial review of discretionary administrative dispositions." App., *infra*, 21a.

The court of appeals also rejected petitioner's separation of powers challenge to § 440(a), noting that "Article III does not add anything to an argument based on the due process clause." App., *infra*, 22a. The court relied on its conclusion that "[t]he power to establish the inferior federal courts under Article III § 1 permits Congress to determine their jurisdiction," that "[f]or the first century of the nation's existence, the inferior courts lacked federal-question jurisdiction," and that the Administrative Procedure Act "forbids review of decisions 'committed agency discretion by law.'" *Ibid.* The court thus reasoned that since "[n]one of these limitations offends Article III; neither does § 106(a)(10), which, functionally understood, defines a set of decisions committed to agency discretion." *Ibid.* (citation omitted).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision that § 440(a), as a jurisdictional statute, is not subject to the presumption against retroactivity, irreconcilably conflicts with this Court's subsequent decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), which squarely held that "a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.* at 1878 (citing *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994)). On the basis of its failure to apply the presumption against retroactivity, the court of appeals simply noted that Congress has used prospectivity language in other statutes but did not in § 440(a), thus making it "difficult to avoid the conclusion that the AEDPA covers all cases now in the administrative and judicial pipelines." App., *infra*, 9a. Such reasoning also is precisely contrary to this Court's decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), which held that provisions of the AEDPA which were not expressly retroactive did not apply to cases already pending on the date of its enactment. The retroactivity analysis employed in *Lindh* inescapably confirms that § 440(a) does not, and cannot, divest the courts of jurisdiction to review final orders of deportation predicated on conduct pre-dating its enactment. The court of appeals' decision thus should be vacated and remanded for reconsideration in light of *Hughes Aircraft* and *Lindh*.

This case also presents for review the important and unanswered question of whether, and to what extent, lawful permanent residents can constitutionally be deported from the United States without the possibility of independent judicial review. The court of appeals held that § 440(a) of the AEDPA, for the first time in U.S. history, has broadly divested the federal courts of their power to review final orders of deportation against literally thousands of aliens, *even* by way of habeas corpus. Section 440(a) thus squarely raises for the first time the

difficult question of whether deporting lawful permanent residents without independent judicial scrutiny violates the Due Process Clause of the Fifth Amendment, the separation of powers doctrine of Article III, § 1, and the Suspension Clause contained in Article I, § 9 of the Constitution.

For decades, courts and commentators have recognized the uncertainty over Congress' constitutional ability to preclude all judicial review of executive action, particularly where core constitutional liberty interests are at stake. As a direct byproduct of this uncertainty, the federal courts have sharply divided over the constitutional limits on Congress' power to preclude judicial review in deportation cases. This case provides an ideal opportunity to resolve that question once and for all.

Congress recently has enacted numerous statutes precluding judicial review of a wide variety of deportation decisions. This, in turn, has led to an explosion of litigation in the federal courts over the constitutionality of such "door closing" statutes—litigation that will continue until the fundamental constitutional questions raised here are resolved by this Court. The need for Supreme Court review in this case also is especially compelling because until this Court decides whether Congress constitutionally can preclude judicial review of final orders of deportation, permanent residents such as petitioner will continue to be deported without judicial review and without any independent guarantee that their deportations are lawful. The need for Supreme Court review is both immediate and compelling.

I. THE COURT OF APPEALS' DECISION SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISIONS IN *HUGHES AIRCRAFT* AND *LINDH*.

The court of appeals held that § 440(a) deprived it of jurisdiction to review a final order of deportation that was

entered long before the statute was enacted. Like other courts of appeals, the court relied on its view that jurisdictional statutes are not subject to the presumption against retroactivity articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). App., *infra*, 8a. See also *Fernandez v. INS*, 113 F.3d 1151, 1153 (10th Cir. 1997) ("the presumption against retroactivity does not apply to a jurisdictional statute such as section 440(a)"); *Duldulao* v. *INS*, 90 F.3d 396, 399 (9th Cir. 1996) (applying § 440(a) to pending cases because the "presumption against retroactive application of new legislation to pending cases * * * does not apply to rules conferring or withdrawing jurisdiction"). In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), however, this Court confirmed that the presumption against retroactivity indeed applies *fully* to jurisdictional statutes, and thus rejected the notion that there exists a presumption favoring application of jurisdictional statutes retroactively to pending cases:

> the Ninth Circuit [held] that absent a clear statement of congressional intent, there is a strong presumption in favor of retroactivity for jurisdictional statutes. * * * *The Ninth Circuit simply misread our decision in Landgraf, for the only "presumption" mentioned in that opinion is a general presumption against retroactivity*. The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself, as the United States recognizes.

117 S. Ct. at 1878 (emphasis added; citations omitted). See also *George v. Camacho*, 1997 WL 395308, *3 n.7 (9th Cir. July 16, 1997) (en banc) (recognizing that *Hughes Aircraft*

"suggested that this court has previously gone too far in concluding that 'there is a strong presumption in favor of retroactivity for jurisdictional statutes'") (citation omitted).

In *Hughes Aircraft*, this Court held that jurisdictional statutes may only properly be applied to cases already pending when such statutes merely determine "which court shall have jurisdiction to entertain a particular cause of action" and which thus "affect only where a suit may be brought, not whether it may be brought at all." 117 S. Ct. at 1878. As the Court explained, where a statute "creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court *but to the substantive rights of the parties as well.*" 117 S. Ct. at 1878 (emphasis added). The same is undeniably true where a statute completely deprives a party of any judicial forum. Thus, applying the retroactivity analysis articulated in *Hughes Aircraft*, § 440(a) cannot be applied to prior pending cases because (at least according to the court of appeals) it divests *all courts* of jurisdiction to review final orders of deportation subject to its terms, thus impacting the substantive ability of aliens to seek relief against unlawful orders of deportation. See *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492 (7th Cir. 1996) (Posner, C.J.) (noting that while "jurisdictional and procedural provisions normally are applied to pending cases," this is "not [true] in every case," and refusing to apply § 440(a) retroactively to eliminate alien's substantive right to judicial review). At the very least, the decision of the court of appeals should be vacated and remanded for reconsideration in light of *Hughes Aircraft*.

The court of appeals' presumptive application of § 440(a) to this case also irreconcilably conflicts with this Court's decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), which held that other provisions of the AEDPA dealing with judicial review could not be applied to pending cases absent a clear statement from Congress requiring that result. In this case, the

court of appeals held that because Congress used explicit prospectivity language in IIRIRA, an entirely different statute, but used no such language in § 440(a), this was indicative of Congress' intent to apply § 440(a) to pending cases. Under *Lindh* and *Hughes Aircraft*, the court of appeals' analysis was precisely backwards. Given the presumption *against* retroactivity applies to jurisdictional statutes like § 440(a), it is the absence of *retroactivity* language in § 440(a) that is decisive.

In *Lindh*, for instance, this Court held that provisions of the AEDPA that limited the scope of habeas corpus review did not apply to habeas petitions filed before the statute was enacted, even in the face of the government's contention that the provisions in question were merely "procedural." This Court held that to limit the ability of parties to seek habeas corpus review in cases that already pending when the AEDPA was enacted would be impermissibly "retroactive" under *Landgraf*. 117 S. Ct. at 2064. This Court also held that because Congress included explicit retroactivity language elsewhere in the AEDPA (see, *e.g.*, (§§ 413(g), 421(a), 435, 441(a)), provisions (like § 440(a)) that contained no such language could not be applied to prior pending cases. See *Williams v. Cain*, ___ F.3d ___, 1997 WL 395251, *9 (5th Cir. 1997) ("The government's suggestion that the negative implication argument is 'meritless' is simply wrong, as *Lindh* makes clear").

In sharp contrast, the court of appeals in this case, citing its own earlier decision in *Lindh* which this Court later reversed, held that § 440(a) is applicable to all pending cases unless an alien can "demonstrate how the change of law pulled the rug out from under his litigating strategy." App., *infra*, 10a. Yet, as this Court's decision in *Lindh* makes clear, no such showing is required in order to trigger the presumption against retroactivity. Under *Lindh*, all that matters is that § 440(a), as read by the court of appeals, will destroy petitioner's "substantive entitlement to relief" (117 S. Ct. at 2063) against a final

order of deportation that he contends to be unlawful, and that nothing in the text of the statute expressly mandates its application to pre-enactment cases or conduct. The court's decision that § 440(a) applies to "all cases now in the administrative and judicial pipelines" thus should be vacated and remanded for reconsideration in light of *Hughes Aircraft* and *Lindh*.

II. FEDERAL DECISIONS APPLYING § 440(A) REFLECT THE ONGOING CONFUSION OVER THE EXTENT TO WHICH CONGRESS CAN PRECLUDE JUDICIAL REVIEW OF FINAL ORDERS OF DEPORTATION.

"The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." *Superintendent* v. *Hill*, 472 U.S. 445, 450 (1985). Presently, this Court's decisions do not provide a definitive answer to this question, and the federal courts have been unable to reach a consensus on their own. As noted by Professor Fallon, "[t]he Supreme Court has failed to speak unequivocally about questions of entitlement to judicial review." 93 COLUM. L. REV. at 333. Accord, *e.g.*, 5 K. Davis, ADMINISTRATIVE LAW TREATISE § 28:3, at 264 (2d ed. 1984) ("[w]hether a statute that bars judicial review of a substantial constitutional issue would be constitutional has no clear answer in present law. * * * [t]he lower courts have reacted variously to the question"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell To Schor*, 35 BUFF. L. REV. 765, 869 (1986). Indeed, for more than 40 years since Professor Hart noted the uncertainty of whether Congress could constitutionally preclude judicial review of deportation decisions in *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-95 (1953), courts and commentators alike have acknowledged the "confu-

sion" and "disarray" that exists as to the constitutional necessity of judicial review over action by the executive branch[1]—an issue that involves "profound and long-debated questions about the power of Congress, consistent with Article III, to preclude all judicial review of executive agency action." *Marozsan* v. *United States*, 852 F.2d 1469, 1479 (7th Cir. 1988) (en banc).

Recent attempts by the federal courts to apply § 440(a) reflect ongoing confusion over the extent to which Congress constitutionally can preclude judicial review of such orders, and confirm that there will be no consensus in the absence of Supreme Court review. The court of appeals, for instance, held that § 440(a) precludes judicial review of decisions concerning discretionary relief, but does not preclude review of whether the alien is in fact deportable by reason of having committed one of the predicate offenses identified in § 440(a). Other courts of appeals have rejected this approach, holding that § 440(a) *completely* deprives the courts of appeals of jurisdiction to review final orders of deportation. For instance, in *Berehe v. INS*, 114 F.3d 159, 161 (10th Cir. 1997), the court "decline[d] to adopt the * * * holding" of the court of appeals below and held "that the language of AEDPA § 440(a) and IIRIRA § 309(c)(4)(G) does not permit the court to review the merits of whether an alien is validly deportable by reason of having

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[1] Fallon, 93 COLUM. L. REV. at 309. See also D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299, 304 (1990) (arguing that Article III and the Due Process Clause have independent significance as guarantors of judicial review, and noting that the current debate "leaves open large questions about the necessity and scope of judicial review"); A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 (1989) (noting this uncertainty even though "[t]he Supreme Court has grappled with this question on no fewer than four occasions in the 1980s"); P. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 269 (1990).

committed one of the enumerated criminal offenses." See also, *e.g.*, *Duldulao* v. *INS*, 90 F.3d 396, 400 (9th Cir. 1996). Other courts of appeals have taken yet a different approach, holding that judicial review is constitutionally guaranteed where "constitutional rights applicable to aliens may be at stake." *Salazar-Haro* v. *INS*, 95 F.3d 309, 311 (3d Cir. 1996). See also, *e.g.*, *Anwar v. INS*, 107 F.3d 339 (5th Cir. 1996), *vacated on other grounds*, 116 F.3d 140 (1997) (holding that § 440(a) does not apply to due process claims).

The courts also have sharply differed over the extent to which § 440(a) precludes judicial review of final orders of deportation through habeas corpus. The court of appeals below, for instance, held that final orders of deportation are entirely unreviewable by way of the constitutional writ of habeas corpus provided for in Article I, § 9, and that § 440(a) also "abolishes even review under § 2241." App., *infra*, 19a. Every other court that has considered the question, however, has held that § 440(a) does not preclude habeas corpus review of deportatioin orders. See, *e.g.*, *Mojica v. Reno*, ___ F. Supp. ___, 1997 WL 400734, *27 (E.D.N.Y. 1997) (Weinstein, J.) ("AEDPA and IIRIRA leave undisturbed the independent authority of federal district courts to entertain habeas petitions under section 2241") (citing, *e.g.*, *Duldulao v. Reno*, 958 F. Supp. 476 (D. Haw. 1997); *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997); *Mbiya* v. *INS*, 930 F. Supp. 609, 612 (N.D. Ga. 1996)). See also *Powell* v. *Jenifert*, 937 F. Supp. 1245, 1252-53 (E.D. Mich. 1996) (same). These courts have been unable, however, to agree as to the *scope* of habeas review. Compare *Mbiya*, 930 F. Supp. at 612 (habeas review "extend[s] to those situations in which the petitioner's deportation would result in a fundamental miscarriage of justice"); *Powell*, 937 F. Supp. at 1252-53 (same), with *Mojica*, 1997 WL 400734, at *36 (holding that "section 2241 is not limited to constitutional

claims or claims of fundamental miscarriage of justice" and that "the scope of section 2241 remains unaffected").

In short, recent attempts to apply § 440(a) confirm the federal courts' long-standing uncertainty over the constitutional limits on Congress' power to preclude judicial review of final orders of deportation — uncertainty that will only continue to deepen in the wake of Congress' recent and expanded efforts to preclude judicial review in deportation cases. Review by this Court is warranted to resolve this confusion and to bring needed clarity to this important area of the law.

III. THE COURT OF APPEALS' RULING CONFLICTS WITH THIS COURT'S CONSTITUTIONAL DECISIONS.

By holding that § 440(a) completely deprived it of jurisdiction to review the lawfulness of the final order of deportation against petitioner, and by leaving petitioner with no avenue in which to challenge that order, the decision of the court of appeals irreconcilably conflicts with this Court's long-standing interpretations of the Due Process Clause of the Fifth Amendment, the separation of powers doctrine of Article III, § 1, and Article I, § 9. See generally Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV L. REV. 1850 (1997).

A. Section 440(a) Violates the Due Process Clause.

In *Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982), this Court held that "a continuously present resident alien * * * threatened with deportation * * * has a right to due process in such a situation." *Plasencia* also confirmed that the due process framework articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), applies to resident aliens in deportation proceedings:

> "[T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional safeguards, and the interest of the government in using the current procedures rather than additional or different procedures."

459 U.S. at 34 (quoting *Mathews*). *Plasencia* also reiterated the Court's long-standing recognition that a lawful resident alien's interest in avoiding deportation "is, without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom. * * * Further, she may lose the right to rejoin her immediate family, a right to ranks high among the interests of the individual." *Plasencia*, 459 U.S. at 34, quoting *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945).

In this case, the court of appeals cited *Plasencia* and acknowledged its rule, noting that "[d]ue process requires more as the stakes, and therefore the costs of error, rise." App., *infra*, 20a. Yet, the court then inexplicably rejected petitioners' due process challenge to § 440(a) without *any* application of *Plasencia's* three-part test — a test whose straightforward application inescapably leads to the conclusion that due process does indeed guarantee judicial review of deportation orders given the magnitude of the liberty interests at stake and the probability of erroneous deportations without judicial review.[2]

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[2] Instead of applying *Plasencia*, the court of appeals cited this Court's *dictum* thirty years earlier in *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) that "[n]o judicial review is guaranteed by the Constitution." The court's reliance on this language in *Carlson* is misplaced for a number of reasons. *First*, *Carlson* did not involve judicial review of a deportation order, but rather dealt with bail determinations. *Second*, the quoted language was divorced from its proper context. Immediately preceding the quoted language, *Carlson* confirmed that the executive's "power to expel aliens * * * is, of course, subject to judicial intervention under the 'paramount law

This Court consistently has recognized that deportation involves "issues basic to human liberty and happiness" (*Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950)), and that because deportation of a permanent resident is "the equivalent of banishment or exile" (*Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)), "the liberty of an individual is at stake." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). See also, *e.g.*, *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (noting that deportation "obviously deprives [an alien] of liberty" and "may result also in loss of both property and life, or of all that makes life worth living"). These liberty interests consistently have been accorded special constitutional protection, as this Court has "always been careful not to minimize the importance and fundamental nature of the individual's right to liberty." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). It is for this very reason that the Court's decisions long have suggested "that due process might require some form of judicial review of administrative decisions that threaten constitutionally protected liberty or property interests." *Superintendent* v. *Hill*, 472 U.S. 445, 449 (1985). In this case, however, the court of appeals gave no consideration to the nature and magnitude of these liberty interests implicated by § 440(a).

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of the constitution.'" 342 U.S. at 533. Moreover, each of the cases cited by the Court actually provided judicial review of deportation orders through habeas corpus. In *Mahler* v. *Eby*, 264 U.S. 32, 46 (1924), for instance, the Court endorsed the availability of "habeas corpus proceedings to test the legality of confinement under the decision of an administrative tribunal like the Secretary of Labor in deportation cases." Similarly, in *Turner* v. *Williams*, 194 U.S. 279, 295 (1904), Justice Brewer, in a concurring opinion, wrote that "the courts may and must, when properly called upon by petition in habeas corpus examine and determine the right of any individual retrained of his personal liberty to be discharged from such restraint. I do not believe it within the power of Congress to give to ministerial officers final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts."

Looking to the second of the *Plasencia* factors, without judicial review the "risk of an erroneous [deportation]" (*Plasencia*, 459 U.S. at 34) is unacceptably high since the administrative review mechanisms provided in the INA are constitutionally insufficient without judicial review. The INA does not provide any form of impartial administrative review of deportation orders. The BIA is simply a construct of the Department of Justice whose members are civil servants subject to removal by the Attorney General. The BIA only exercises such discretion and authority as is conferred to it by the Attorney General. Decisions of the BIA also may be, and frequently are, modified or overruled by the Attorney General — the very same official charged with issuing, prosecuting and executing final orders of deportation. See 8 C.F.R. §§ 3.1(g), 3.1(h)(1)(i). Indeed, the Attorney General recently invoked this power to reverse the BIA's decision in *Matter of Soriano*, Interim Decision 3289 (1996), which had held that § 440(d) of the AEDPA does not apply retroactively to pending cases.

The mere fact that aliens are provided an administrative hearing is not constitutionally sufficient. As this Court held in *Wong Yang Sun v. McGrath*, 339 U.S. 33, 50 (1950), "[w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." It makes no difference that administrative procedures were fashioned by Congress, since it is not for Congress to decide what process is due under the Constitution. *Den ex dem. Murray v. The Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1855) ("It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process, 'due process of law,' by its mere will").

The probability of erroneous deportations without judicial review is best confirmed by the BIA's track record on appeal. As Chief Judge Posner observed in *Salameda* v. *INS*, 70 F.3d 447, 449 (7th Cir. 1995), "[t]he proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality." Indeed, aliens nationwide have prevailed in *28%* of cases seeking judicial review of deportation or exclusion orders. See P. Schuck, *Continuity and Change: Patterns of Immigration Litigation in the Courts: 1979-1990*, 45 STAN. L. REV. 159, 167 (1992). .

As Judge Kozinski recently has explained, it is an inescapable reality that "agencies are run by people and people make mistakes. Review by a tribunal outside the agency helps correct these rare but tragic errors. In the case of [aliens facing deportation], this may mean the difference between life and death; the effort is surely worth the candle." *Rodriguez-Roman v, INS*, 98 F.3d 416, 432 (9th Cir. 1996) (concurring opinion). The BIA's track record, coupled with the drastic and irreversible consequences of deportation, lead inexorably to the conclusion that, under the Due Process Clause, judicial review of deportation orders is guaranteed.

The notion that judicial review of deportation orders is guaranteed by due process also is firmly grounded in this Court's decisions. In *Ng Fung Ho v. White*, 259 U.S. 276 (1922), for instance, this Court held that the nature and seriousness of the deprivation of liberty resulting from deportation, coupled with the inadequacy of administrative safeguards, creates a right of judicial review under the Due Process Clause:

> To deport one who so claims to be a citizen obviously deprives him of liberty. . . . It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such depri-

> vation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.

259 U.S. at 284. Similarly, *Crowell* v. *Benson*, 285 U.S. 22, 61 (1932), explained that "when fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'" See also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, * * * * He may not be deprived of his life, liberty or property without due process of law. * * * 'the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to act'") (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950)).

In this case, the court of appeals' decision boils down to its essential conclusion that judicial review of administrative denials of discretionary relief is not constitutionally required. App., *infra*, 21a. Yet, the fact that petitioner is seeking review of a denial of discretionary relief in no way minimizes the constitutional necessity of judicial review. As this Court explained in *Foti v. INS*, 375 U.S. 217, 223 (1963), decisions concerning discretionary relief always have been "an integral part of the proceedings which have led to the issuance of a final deportation order." In fact, since deportability often is uncontested, discretionary relief usually is the central focus of deportation proceedings. And because such relief is meant by Congress to protect resident aliens and their families against such things as well-founded fears of persecution and the often-extreme hardships of deportation, the role of discretionary relief in the deportation process cannot be overstated, and thus "the importance of independence of judicial review in an area where

administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman*, 98 F.3d at 432 (Kozinski, J., concurring).

There remain broad categories of discretionary relief available to aliens — including asylum, withholding of deportation, adjustment of status and suspension of deportation — the denial of which would no longer be reviewable under § 440(a). For instance, persons deportable for relatively minor offenses that do not constitute an aggravated felony still would be eligible for various forms of statutory relief. Ironically, permanent residents who commit such offenses actually would be most likely to qualify for relief and would have the greatest need for judicial review to guard against arbitrary denials of such relief. Where the Attorney General abuses that discretion, she necessarily exceeds boundaries set by Congress, and "it is for the federal courts to determine whether an agency to which Congress has delegated power has acted within the confines of its mandate." *Sweezy v. New Hampshire*, 354 U.S. 234, 257 (1957). "Even discretion * * * has its legal limits." *INS* v. *Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., concurring).

If the Due Process Clause, as construed by this Court in *Plasencia,* is to have any meaning at all, it must be read to safeguard against the deportation of lawful permanent residents solely on the basis of administrative proceedings that are indisputably flawed and prone to error and to provide such aliens with an opportunity to challenge the lawfulness of their deportation in an impartial forum.

B. Section 440(a) Violates the Separation of Powers Doctrine of Article III, § 1.

The court of appeals held that "Article III does not add anything to an argument based on the due process clause." App., *infra*, 22a. In fact, as this Court explained in *Plaut* v. *Spendthrift Farm*, 115 S. Ct. 1447, 1463 (1995), the protections

of Article III are not a function of individual rights, but the structural integrity of our tripartite form of government:

> the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Accord *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985).[3]

In *Schor*, the Court articulated the framework for defining the separation of powers component of Article III, § 1:

> in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed

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[3] See also R. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 943 (1988) ("[I]n contrast to the due process clause, article III has an explicit and important separation of powers dimension. A pure due process calculus might undervalue the constitutional interest in maintaining a judicial check against arbitrariness, self-aggrandizement, or politically motivated infidelity to the requirements of law"); D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L. J. 291, 302 (1990) ("Article III protects the rights of litigants precisely *through* its creation of judicial independence, just as more generally a system of separated powers is thought to promote individual liberty") (emphasis in original); A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 n.43 (1989); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 768 (1986).

> determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused regard the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove the Congress to depart from the requirements of Article III.

Id. at 851 (citing *Thomas*, 473 U.S. at 589-93; *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84-86 (1982)). In this case, the *Schor* factors decidedly confirm that § 440(a) violates Article III.

First, the "essential attributes of judicial power" would not be reserved to an Article III court under § 440(a). For more than 100 years, the federal courts have, without interruption, exercised their powers of judicial review over final orders of deportation, including denials of discretionary relief. See, *e.g.*, *Yamataya* v. *Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892); Section 440(a) would take that power away from the Article III courts for the first time. *Second*, under § 440(a), the powers of appellate review traditionally exercised by federal courts would be vested exclusively in the BIA, a body wholly subject to the control of the Attorney General, the very official whose mission it is to issue and execute final orders of deportation. See *supra* at __ & citations therein.

Third, the "origin and importance of the rights to be adjudicated" unequivocally favor independent judicial review by an Article III court, both because of the constitutional magni-

tude of those rights and because of the devastating and long-lasting consequences of deportation to aliens and their families. *Finally*, as to the government's interest in "depart[ing] from" Article III (*Schor*, 478 U.S. at 851), while it may be more "convenient" and "efficient" to allow the INS to deport aliens without the "interference" of judicial review, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. * * * There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President." *INS* v. *Chadha*, 462 U.S. 919, 994, 959 (1983).

In rejecting petitioner's Article III challenge, the court of appeals relied on Congress' "plenary power" over immigration matters and its power to control the jurisdiction of the federal courts.[4] Yet, the notion that Congress' plenary power over immigration somehow immunizes the immigration laws from separation of powers scrutiny was laid to rest in *Chadha*, 462 U.S. at 940-41: "The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitution-

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[4] The court of appeals also wrongly suggested that by precluding judicial review, Congress "functionally" defined "a set of decisions committed to agency discretion." __a. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), however, this Court held that a decision is "committed to agency discretion" only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Here, as in *Overton Park*, "there is 'law to apply' and thus the exemption for action 'committed to agency discretion' is inapplicable." 401 U.S. at 413. Indeed, the ability of federal courts to meaningfully review discretionary decisions by the Attorney General is confirmed by the simple fact that they have done so for decades.

ally permissible means of implementing that power." See also S. Legomsky, *Immigration Law And The Principle Of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 302.

The Constitution divides the powers of government into three separate branches to guard against any branch exercising unfettered authority in violation of the law:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Chadha, 462 U.S. at 919. *Chadha* recognized the political pressure on the executive branch to exceed its delegated authority over immigration at the expense of aliens who lack any discernible voice in our Government.

If Article III means anything, it is that the executive branch may not serve as prosecutor, judge and executioner, nor act as the legal arbiter of its own conduct. Indeed, "[t]he argument for unreviewability in such an instance runs up against a mainstay of our system of government. Madison spoke precisely to the point in The Federalist No. 10: 'No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.'" *Gutierrez de Martinez* v. *Lamagno*, 115 S. Ct. 2227, 2233 (1995) (quoting *The Federalist No. 10*, p. 79 (C. Rossiter ed. 1961) (J. Madison)). See also *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("It would excite

some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process * * * leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust").

"To be sure, it is normally up to the courts to decide whether an agency has complied with its statutory mandate." *Chadha*, 462 U.S. at 919 n.22. "The underlying conception [of Article III] is that wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary." Fallon, 101 HARV. L. REV. at 938, citing *The Federalist No. 78* (A. Hamilton).

If § 440(a), as construed below, completely insulates deportation orders against lawful permanent residents from scrutiny by the Article III courts, "it would present a situation in which the deportation for them and others like them, from beginning to end, would be enstrusted solely to the executive branch without any oppotunity for correction of legal errors, except those of 'substantial constitutional' proportion." *Mojica*, 1997 WL 400734, at *27. Doing so "would call into question the most basic tenets of our tripartite system of government which has since *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 2 L.Ed. 60 (1803), assigned to the judiciary the final responsibility for interpreting the law." *Ibid.*

C. The Court Of Appeals' Ruling Also Squarely Conflicts With This Court's Habeas Corpus Decisions.

The court of appeals held that denials of discretionary relief from deportation are unreviewable in habeas corpus proceedings, and that Congress impliedly repealed the habeas

jurisdiction previously granted to district courts to review deportation orders pursuant to 28 U.S.C. § 2241. In so doing, the court of appeals' decision squarely conflicts with this Court's habeas corpus rulings and those of virtually every other federal court that has considered the issue.

To begin with, this Court's decisions make clear that denials of discretionary relief from deportation are indeed reviewable by way of the constitutional writ of habeas corpus guaranteed by Article I, § 9. For instance, in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), this Court reviewed a habeas petition and reversed the denial of discretionary relief on non-constitutional grounds since the BIA had exercised its discretion in a manner inconsistent with "existing valid regulations." Similarly, in *United States ex rel. Hintopolous v. Shaughnessy*, 353 U.S. 72 (1957), this Court adjudicated a habeas petition in which the petitioner claimed that he had been improperly denied discretionary relief, a claim that this Court ultimately rejected after concluding that the agency had "applied the correct legal standards" and that there had been no "abuse of discretion." In short, the notion that denials of discretionary relief are unreviewable by way of the constitutional writ of habeas corpus is simply wrong.

Moreover, the court of appeals' decision that Congress impliedly repealed the broader habeas jurisdiction of the federal courts to review deportation orders under 28 U.S.C. § 2241 is squarely at odds with this Court's unambiguous holding in *Felker v. Turpin*, 116 S. Ct. 2333, 2339 (1996), in which this Court unanimously reaffirmed the "clear statement" rule governing jurisdictional repeals and "decline[d] to find a * * * repeal of § 2241 * * * by implication." Accord *Ex Parte Yerger*, 75 U.S. 86, 105 (1868) ("Repeals by implication are not favored"). Although the court of appeals believed that AEDPA and IIRIRA repealed § 2241, nothing in either statute even *mentions* § 2241—let alone repeal it. Thus, "[i]n keeping

with *Felker* and *Yerger*, the court cannot here find that Congress repealed section 2241 by implication." *Mojica*, 1997 WL 400734, at *31 (citations omitted). At the very least, the court of appeals' decision should be vacated and remanded for reconsideration in light of *Felker*.

IV. THE QUESTIONS PRESENTED ARE OF GREAT LEGAL AND PRACTICAL IMPORTANCE.

As Judge Weinstein recently has commented, t]his case "presents jurisdictional issues of great moment." *Mojica*, 1997 WL 400734, at *27. During the past 18 months, Congress has enacted numerous statutory provisions that have eliminated judicial review over a wide variety of deportation decisions, including virtually all discretionary decisions by the Attorney General under the INA. In addition to the limitations on judicial review contained in the AEDPA, IIRIRA added at least six new statutory provisions that limit judicial review of deportation orders. For instance, § 306(a) of IIRIRA broadly precludes judicial review over virtually all discretionary decisions by the Attorney General under the INA, including decisions regarding waivers of deportability and suspension of deportation. It is thus a certainty that the question of whether Congress constitutionally can preclude judicial review of deportation orders will recur in thousands of pending and future deportation cases which the federal courts will be asked to review, and that judicial review litigation in immigration cases will not abate.

The immediacy and practical importance of the questions presented to aliens like petitioner who are threatened with imminent deportation also cannot be overstated. Until this Court determines whether Congress constitutionally can preclude judicial review in deportation cases such as this, hundreds, if not thousands, of lawful permanent residents like petitioner will be deported by the INS, and will have their extensive family and economic ties to this country destroyed

without the slightest assurance by an independent arbiter that those deportations have been carried out lawfully. And if the court of appeals was wrong to dismiss petitioner's appeal for lack of jurisdiction, and this Court someday holds that such elimination of judicial review is indeed unconstitutional, it will be of little solace to aliens whose deportations already were executed without judicial review. As this Court emphasized in *Stone v. INS*, 115 S. Ct. 1537, 1546 (1995), "the consequences of deportation are so final, unlike orders in some other administrative contexts." For all of these reasons, this Court should grant review to clarify whether, and to what extent, the federal courts have jurisdiction to review final orders of deportation involving the many thousands of aliens covered by § 440(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 94-3071

TER YANG, also known as RICKY YANG, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 95-3665

ELIZARDO TERRAZAS-GARCIA, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 96-1824

DIMITRIOS KATSOULIS, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 96-2044

JELICA BICANIN, also known as JELICA MURATI, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Petitions for Review of Order of the
Board of Immigration Appeals

Argued January 24, 1997—Decided March 18, 1997

Before CUMMINGS, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge. These deportation cases pose questions about the meaning and constitutionality of parts of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214 (Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA), Division C of Pub.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996). The IIRA rewrote the rules for both deportation (renamed "removal") and judicial review, but most of its rules apply only to proceedings commenced on or after April 1, 1997. See *INS v. Yueh-Shaio Yang*, 117 S.Ct. 350, 352 n.1 (1996); *Lalani v. Perryman*, 105 F.3d 334, 335-37 (7th Cir.1997). For earlier proceedings the former law, as modified by the AEDPA, applies. Under this body of law, a final order of deportation is reviewable in the court of appeals, but with an exception created by §440(a) of the AEDPA (as amended by §306(d) of the IIRA), amending §106(a)(10) of the Immigration and Nationality Act (INA), 8 U.S.C. §1105a(a)(10):

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

Section 241 is codified as 8 U.S.C. §1251. The pertinent portions of this law, including an amendment made by §435(a) of the AEDPA, read:

> (a) Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens: ...
>
> (2) Criminal offenses.

(A) General crimes.

(i) Crimes of moral turpitude. Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(i) [8 U.S.C. §1255(i)]) after the date of entry, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions. Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) Waiver authorized. Clauses (i), (ii), and (iii) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances.

(i) Conviction. Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts. Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses. Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

(D) Miscellaneous crimes. Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--

(i) any offense under chapter 37 [18 U.S.C. §792 et seq.] (relating to espionage), chapter 105 [18 U.S.C. §2151 et seq.] (relating to sabotage), or chapter 115 [18 U.S.C. §2381 et seq.] (relating to treason and sedition) of title 18, United States Code, for which a term of

> imprisonment of five or more years may be imposed;
>
> (ii) any offense under section 871 or 960 of title 18, United States Code;
>
> (iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. § 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. § 1 et seq.); or
>
> (iv) a violation of section 215 or 278 of this Act [8 U.S.C. § 1185 or § 1328],
>
> is deportable.

We must decide whether, and if so how, these rules apply to four aliens who have been ordered deported following the commission of crimes.

I

Ter Yang came to the United States as a refugee with his family in 1980, when he was five years old. This Hmong family was in flight from chaos and persecution in Laos. Alas, arrival in the New World did not end its troubles. Ter Yang took up with a gang and began a life of crime. Two of his crimes led to convictions. (1) Members of the gang broke into a pawn shop and stole 23 pistols, apparently for use in gang activities. Yang pleaded guilty to being a party to the crime of burglary and was sentenced to an indeterminate term of not more than 10 years' imprisonment. (2) The Yang family's garage became a depot for the gang's loot. A search of this garage turned up stolen items, including a gun burgled from a second pawn shop. Yang was convicted of concealing stolen firearms and was sentenced to five years' probation; this crime, a Class D felony in Wisconsin, had a maximum punishment of five years' imprisonment. The immigration

judge ordered Yang deported under §241(a)(2)(A)(ii), because both offenses are "crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct", and under §241(a)(2)(C), because concealing the pilfered gun equates to "possessing" a firearm. The judge also concluded that Yang is ineligible for asylum because the theft of weapons is a "particularly serious crime" (see 8 U.S.C. §1253(h)(2); 8 C.F.R. §208.14(c)) and is ineligible for discretionary relief under §212(c), 8 U.S.C. §1182(c), because there is no ground of exclusion comparable to the §241(a)(2)(C) ground of deportation. See *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir.1993). Having contested deportation under §241(a)(2)(A)(ii) before the immigration judge, Yang dropped that contention on appeal to the Board of Immigration Appeals. Although he renewed his argument that the burglary was not a "particularly serious crime," the BIA disagreed. The Board also held Yang ineligible for other relief, for essentially the reasons the immigration judge gave. In this court Yang argues that he is entitled to apply for asylum because the burglary was not a "particularly serious crime"; that he is not deportable under §241(a)(2)(C) because concealing a firearm does not imply possessing it; and that even if he is deportable under both §241(a)(2)(A)(ii) and §241(a)(2)(C) he is entitled to seek discretionary relief under §212(c).

Elizardo Terrazas-Garcia entered the United States from Mexico in 1962, when he was 16, as a lawful permanent resident. He has six children, all of whom are U.S. citizens. Between 1980 and 1988 (perhaps 1990), Terrazas-Garcia was a full-time drug dealer. His convictions for possession of cocaine and distribution of heroin led to a deportation order based on §241(a)(2)(A)(iii), the aggravated-felony provision. Terrazas-Garcia concedes that he is deportable under this section but wants to remain in the United States. For this he needs a favorable exercise of discretion under §212(c). The

immigration judge and then the BIA held that Terrazas-Garcia does not deserve this boon. In this court Terrazas-Garcia argues that the Board abused its discretion because it did not fully discuss evidence that he has been rehabilitated since 1990, and that his long residence before he took up crime, and large family, are "unusual or outstanding equities" justifying relief from deportation.

Dimitrios Katsoulis came to the United States from Greece in 1972, when he was 10. His criminal record began in 1987 with a conviction for burglary of an automobile. He was sentenced to probation, which did not work. In 1988 he pleaded guilty to possession of marijuana and was again given a non-custodial sentence. In 1991 he pleaded guilty to possession of cocaine, with intent to distribute that drug, and to distribution of heroin on a separate occasion. These convictions led to a term of three years' probation, and again no confinement. Continued involvement with drugs led supervisory officials to threaten revocation of the probation, but nothing happened. In January 1993 Katsoulis pleaded guilty to possession of cocaine and was sentenced to three years' incarceration. He served less than a year, but the INS got wind of his troubles with the law and commenced deportation proceedings. The immigration judge and BIA found him deportable under §241(a)(2)(B)(i), the controlled-substance provision, and denied his request for relief under §212(c). In this court Katsoulis argues that the Board abused its discretion because it did not fully discuss evidence that he has been rehabilitated and that he has close ties to his family, which he submits are "unusual or outstanding equities" justifying relief from deportation.

Jelica Bicanin entered the United States from Yugoslavia as a visitor in 1981, when she was 34, and acquired permanent resident status in 1983 following her marriage to a U.S. citizen. In 1991 she pleaded *nolo contendere* to a cocaine offense and

served eight months' imprisonment plus a term in a halfway house. She was ordered deported under both §241(a)(2)(A)(iii) (aggravated felony) and §241(a)(2)(B)(i) (controlled-substance violation). Bicanin's application for relief under §212(c) was denied by both the immigration judge and the BIA, which did not find the equities in her favor sufficient: "[R]espondent has been convicted for shoplifting [in addition to the drug crime]. We also note that the respondent did not become a lawful permanent resident of the United States until she was well into her adult years ... and has substantial family ties to the former Republic of Yugoslavia, where her husband, three of her four children, mother, and six of her eight siblings reside." Bicanin argues in this court that the Board abused its discretion in concluding that she has not shown the "outstanding equities" required to justify relief from deportation.

II

All four petitioners were ordered deported following concessions or conclusions that they committed crimes within the scope of §241(a)(2). The INS therefore asks us to dismiss all four petitions on the authority of the current version of §106(a)(10). Petitioners' first response is that the changes do not apply to deportation proceedings commenced before April 24, 1996.

Section 440(a) of the AEDPA does not have an effective date, but because it curtails the jurisdiction of the courts it is presumptively effective on enactment. *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994); *Bruner v. United States*, 343 U.S. 112, 116-17 (1952); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Gwin v. United States*, 184 U.S. 669, 675 (1902). Every court of appeals that has considered the question has held that the current version of §106(a)(10) applies to pending cases. See *Kolster v. INS*, 101 F.3d 785 (1st Cir.1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d

Cir.1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir.1996); *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir.1996); *Qasguargis v. INS*, 91 F.3d 788 (6th Cir.1996); *Duldulao v. INS*, 90 F.3d 396 (9th Cir.1996); *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir.1997). This conclusion is fortified by the differences between the AEDPA and the IIRA. The latter statute provides for deferred application, an approach that contrasts with the one taken in the AEDPA. It is difficult to avoid the conclusion that the AEDPA covers all cases now in the administrative and judicial pipelines, while the IIRA covers removal proceedings begun during or after this coming April.

Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir.1996), holds that the changes made by §440(a) of the AEDPA do not apply to aliens who may have surrendered rights under the law in force at the time, only to learn that this step--costless or even beneficial when taken--has unexpectedly closed the doors of the federal court to the review of their principal claims. *Cf. Burris v. Parke*, 95 F.3d 465 (7th Cir.1996) (en banc) (similar conclusion for another provision of the AEDPA). We were particularly concerned about the possibility that an alien might concede deportability, despite a colorable defense, in order to expedite a request for relief under §212(c), only to have the concession wipe out jurisdiction under the amended §106(a)(10).

Several courts have disagreed with *Reyes-Hernandez*. See *Kolster*, 101 F.3d at 789; *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30. These courts observe that a concession of deportability does not facilitate or expedite a claim for discretionary relief under §212(c). To the contrary, as Yang's case vividly shows, the concession complicates, and sometimes forecloses, that possibility. The second circuit expressed skepticism "that any alien concedes deportability only because of the expected possibility of section 212(c) relief and the availability of a petition for review of the denial of such

relief. It is far more likely that deportability is conceded because there is no conceivable defense available." *Hincapie-Nieto*, 92 F.3d at 30.

That much was plain in *Reyes-Hernandez* itself. We observed that unless the alien had a colorable defense to deportability under §241(a)(2), the concession of deportability was costless and could not be characterized as a tactical decision gone awry in light of the statutory amendment. *Arevalo-Lopez v. INS*, 104 F.3d 100 (7th Cir.1997), converted this reservation to a holding, dismissing a petition for review, on the authority of §106(a)(10), after concluding that the alien did not have a colorable defense to deportation. Terrazas-Garcia, Katsoulis, and Bicanin concede that they lack a colorable defense to deportation, and that under Arevalo-Lopez the amended §106(a)(10) applies. They ask us to overrule *Arevalo-Lopez*, but we are not inclined to do so. *Reyes-Hernandez* is a decision with a limited domain, as *Arevalo-Lopez* properly recognizes--a domain that it would be inappropriate to expand, given the force of precedent in other circuits.

Only Yang attempts to use the safe harbor recognized in *Reyes-Hernandez*. He contends that he is not deportable under §241(a)(2)(C), because concealing the gun in the family garage differs from "possessing" a firearm. This is certainly a colorable defense to deportation under §241(a)(2)(C). But Yang's problem is that he is unable to demonstrate how the change of law pulled the rug out from under his litigating strategy. Such a demonstration is essential--or so we have held when deciding what other provisions of the AEDPA apply to pending cases. See *Lindh v. Murphy*, 96 F.3d 856 (7th Cir.1996) (en banc), cert. granted, 117 S.Ct. 726 (1997); *Roldan v. United States*, 96 F.3d 1013 (7th Cir.1996). Yang has not been mouse-trapped. True enough, he did not make the §241(a)(2)(C) argument to the immigration judge, but this was

not part of a plan to facilitate a plea for discretionary relief. To the contrary, under the Board's precedent (and the law of this circuit, see *Leal-Rodriguez*) the concession *foreclosed* relief under §212(c). Being behind the eight ball cannot be attributed to the AEDPA. What is more, although Yang conceded deportability before the BIA under §241(a)(2)(A)(ii), he had resisted this theory before the immigration judge; again he did not drop an objection in order to set up a claim for relief, for the finding of deportability under §241(a)(2)(A)(ii), coupled with the Board's view that theft of guns is a "particularly serious crime", extinguished the possibility of asylum.

III

Three of the petitioners acknowledge that if the current version of §106(a)(10) applies (as we have just held) and is constitutional (the subject of Part IV below), then their petitions must be dismissed for want of jurisdiction. Again Yang is the exception. He denies that he is deportable under §241(a)(2)(C), and before the immigration judge he denied that he was deportable under §241(a)(2)(A)(ii). May he renew these arguments, in order to persuade us that judicial review is permissible despite §106(a)(10)?

The Department of Justice is of two minds about this question. Counsel in three of these four cases firmly answered "no." On this view, if the BIA states that a person is an alien deportable for a listed reason, the court lacks jurisdiction. The competing understanding, advanced by the Department's lawyer in the fourth case, is that the court may (indeed, must) determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute. When addressing these issues, this lawyer contended, the court must give the BIA's conclusions appropriate respect, but if even with deferential review the BIA's conclusions cannot be sustained, then §106(a)(10) falls out of the picture.

This latter position has the support of the statutory text. Congress did not say that review is precluded if the Attorney General *finds* that a person is an alien deportable by reason of particular criminal convictions. The statute says that review is unavailable at the behest of "an alien who is deportable by reason of having committed a criminal offense covered in" enumerated sections. There is a big difference. When judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists. The doctrine that a court has jurisdiction to determine whether it has jurisdiction rests on this understanding. *Land v. Dollar*, 330 U.S. 731, 739 (1947). More to the point, *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), shows that application of a review-preclusion statute does not depend on the agency's findings. The EPA promulgated a regulation it called an "emission standard." A statute limited review of emission standards, but not of other administrative orders, such as work practice rules. The Court held in *Adamo Wrecking* that whether the regulation was indeed an emissions standard was open to review, although the answer "yes" would have foreclosed any further judicial role. Just so here. Whether Yang is an alien deportable by reason of certain crimes is open to review, although the answer "yes" brings proceedings to an end. We think it highly unlikely that Congress meant to enable the Attorney General to expel an alien with a clean record just by stating that the person is a criminal, without any opportunity for judicial review of a claim of mistaken identity or political vendetta. Certainly the text of §106(a)(10) is consistent with the normal approach reflected in *Adamo Wrecking*, and, as Part IV shows, giving §106(a)(10) this reading solves a potential constitutional problem.

One caveat is in order. None of the aliens contends that the order of deportation is based on a secret reason. Suppose a future petitioner were to contend that the Attorney General regularly remitted the deportation of criminal aliens who are

Christian, but not those who are Moslem. A contention that this had occurred might mean that the order of deportation was not "by reason of having committed a criminal offense" listed in §241(a)(2), but was by reason of religion. Intrusion of a reason other than a statutorily permissible one might well affect the operation of §106(a). *Cf. Quackenbush v. Allstate Insurance Co.*, 116 S.Ct. 1712, 1718-20 (1996); *Czerkies v. Department of Labor*, 73 F.3d 1435 (7th Cir.1996) (en banc). All of the petitioners concede that the reason for deportation is the stated one, so we need not explore this question further.

According to the BIA, Yang is deportable under §241(a)(2)(A)(ii) for committing two crimes of moral turpitude. Yang does not contest this ground of deportability; he did contest it before the immigration judge, but he dropped that argument on appeal to the Board and has not sought to revive it. One listed ground of deportation is enough to preclude review of the order, so we could stop here--but Yang filed his appeal to the BIA and his petition for review before Congress enacted the AEDPA, and he filed his brief before the further amendments made by the IIRA. These events potentially alter the consequences of his litigation strategy, and we believe that they relieve him of the consequences that usually attend failures to address issues. That we have the *power* to adjudicate issues relevant to jurisdiction, even those that have not been briefed, cannot be doubted. *Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90, 99 (1991); *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 479-80 (7th Cir.1997). Metamorphosis of the jurisdictional rules make Yang's an appropriate case to exercise that power.

Before the changes made by the IIRA, deportation under §241(a)(2)(A)(ii) would not have blocked judicial review. Section 440(a) of the AEDPA originally referred to "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are otherwise covered by section

241(a)(2)(A)(i)". Section 241(a)(2)(A)(i) deals only with crimes committed within 5 or 10 years of entry; Yang's first conviction came 12 years after his entry. The IIRA amended §440(d) of the AEDPA, and thus §106(a)(10) of the INA, by adding the phrase "without regard to the date of their commission" after the words "predicate offenses are". As a result, the delay between Yang's entry and his crimes no longer affected the operation of §106(a)(10). This change made by the IIRA interacts with an amendment the AEDPA made to §241(a)(2)(A)(i)(II). The old version of this subsection limited deportation to crimes that produced sentences exceeding one year; the revised version makes any crime of moral turpitude a ground of deportation if "a sentence of one year or longer may be imposed". The change to §241(a)(2)(A)(i)(II) is prospective: "The amendment made [to this subsection] shall apply to aliens against whom deportation proceedings are initiated after the date of the enactment of this Act." AEDPA §435(b). Yang was sentenced to 10 years' imprisonment for his first crime, but to probation for the second. Is the prospectivity rule of §435(b) limited to persons deported *under* §241(a)(2)(A)(i), or does it affect those ordered deported (as Yang was) under §242(a)(2)(A)(ii), when the operation of §106(a)(10) depends on a demonstration that each of the two crimes of moral turpitude is "otherwise covered by section 241(a)(2)(A)(i)"? *Which version* of §241(a)(2)(A)(i) must "otherwise cover" the crime? *Pichardo v. INS*, 104 F.3d 756 (5th Cir. 1997), holds that the original version must cover the crime, and it would not be sensible to create a conflict on such an esoteric question with limited prospective significance. It follows that the crimes-of-moral- turpitude ground for Yang's deportation does not preclude review of the order.

Then there is §241(a)(2)(C), which also could activate §106(a)(10). But we agree with Yang that the record does not establish that this section applies. Concealing property differs

at least in principle from "possessing" it. Yang may have turned his family's garage into a depot for the gang without being able to exercise dominion over its contents--for his comrades in crime might have taken retribution had he removed anything from the garage for his own use. The record of conviction does not establish how much control Yang possessed over the contents of the garage. Because the immigration judge and the BIA based their order on the formal record of conviction, without making an effort to determine whether Yang "possessed" the weapons in the garage, we need not decide whether §106(a)(10) permits the Board (or the court) to look behind the judgment of conviction--and, if so, how far behind it (to the charging papers, the plea transcript, the record of trial, perhaps to evidence in the deportation proceedings).

Although we have resolved every debatable point in Yang's favor on the jurisdictional question, he does not fare so well on the merits. One reason, perhaps the only reason, why the record is silent with respect to the details of the concealment crime is that Yang chose not to contest the §241(a)(2)(C) ground of deportability before the immigration judge. The parties dispute whether Yang "admitted" deportability under §241(a)(2)(C), but, whether or not he did so, he did not *contest* this ground. (At the hearing Yang intoned "I guess" after questions by the immigration judge such as "Do you admit that you're deportable for that reason?" and statements like "So, we'll show that you're admitting this charge.") The jurisdictional consequences of this omission were unknowable at the time, which is why we have bent over backward in Yang's favor, but the substantive consequences were settled. Someone deportable by reason of a weapons offense is ineligible for relief under §212(c), because there is no comparable ground of excludability.

Now it turns out that commission of multiple crimes of moral turpitude *is* a ground of exclusion, so the conclusion that

Yang is deportable for that reason would not independently bar an application for §212(c) relief. Although it hardly makes sense to say that an alien who commits one firearms crime is ineligible for discretionary relief, while a second crime restores eligibility, the law is full of quirks. We need not pursue this argument, however, because it is clear from the Board's treatment of the moral-turpitude theory that it was not going to exercise discretion in Yang's favor under §212(c). It called the crimes "particularly serious" and foreclosed even an application for asylum. It hardly seems likely that the Board would have exercised discretion under §212(c) in Yang's favor, had the Board believed that there was any discretion to exercise.

As a rule we may consider, in support of an administrative decision, only those reasons the agency gave. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). But that principle is of little force here, for two reasons. First, we have rescued Yang from his failure to contest deportability under §241(a)(2)(C). Although this preserves our jurisdiction, Yang's omissions in the administrative process make it impossible to fault the Board for failing to exercise discretion under §212(c). Second, it is pointless to remand if "it is clear what the agency decision must be." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1094 (7th Cir. 1994); *Osmani v. INS*, 14 F.3d 13, 15 (7th Cir.1994). Yang is well on his way to becoming ineligible for §212(c) relief without regard to §241(a)(2)(C) and the "comparable ground of excludability" criterion.

Once an alien has spent five years in prison for an aggravated felony, his eligibility for §212(c) relief ends. See *Buitrago- Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993); *In re Ramirez-Somera*, 20 I.&N. Dec. 564 (BIA 1992). Yang has not passed that milestone, but his ten-year sentence means that he may well do so. The BIA is unlikely to ignore the significance of the passage of prison time--or of its own finding that the felonies are so serious that they preclude even the

possibility of asylum. In these circumstances a grant of §212(c) relief, which is supposed to be available more readily than asylum, would border on the irrational. Because the Attorney General, and therefore the Board, has substantial discretion to determine that an offense is too serious, and the alien too dangerous, to be the beneficiary of discretionary relief--so *Yueh-Shaio Yang* held, with support in many earlier cases--and because the Board effectively made that decision with respect to Ter Yang, the order of deportation entered against him must be sustained. See *Garcia v. INS*, 7 F.3d 1320, 1323 (7th Cir.1993).

IV

The three remaining petitioners contend that the Constitution entitles them to judicial review, for two reasons: first, that Article III prevents the political branches of government from curtailing the powers of the judicial branch; second, that deportation without any opportunity for judicial review would deprive them of their liberty without due process of law. Four courts of appeals have addressed and rejected these contentions, although they observe that limited opportunity to apply for a writ of habeas corpus may remain. *Kolster*, 101 F.3d at 790-91; *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31; *Duldulao*, 90 F.3d at 399-400 & n.4. A fifth rejected the constitutional arguments without remarking on the role of habeas corpus. *Boston-Bollers*, 106 F.3d 352, 354-55. Other courts of appeals have rejected constitutional objections *sub silentio*. Petitioners' arguments were presented to the sixth circuit in *Qasguargis*, which dismissed the petition for review without discussing the Constitution. Our prior opinions, *Arevalo-Lopez* and *Reyes-Hernandez*, did not consider constitutional objections to §106(a)(10)--none was advanced in either case--and the time has arrived to do so. Although the INS contends that petitioners did not present their constitutional arguments in a timely fashion, Terrazas-Garcia filed his petition

before Congress enacted the AEDPA. He at least may reply in constitutional terms to the motions to dismiss it.

Aliens may seek the writ that Art. I §9 cl. 2 preserves against suspension. But we are reluctant to place weight on its availability, because the Supreme Court long ago made it clear that this writ does not offer what our petitioners desire: review of discretionary decisions by the political branches of government. See, e.g., *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus. But a want of due process is not established by showing merely that the decision is erroneous."); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 132, 134 (1924) ("Tisi's claim to be discharged on habeas corpus rests wholly upon the contention that he has been denied due process of law. . . . [M]ere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law."). There is a vast gulf between the non-suspendable constitutional writ and the Administrative Procedure Act. See *Heikkila v. Barber*, 345 U.S. 229, 236 (1953); *White v. Henman*, 977 F.2d 292 (7th Cir. 1992); *Kramer v. Jenkins*, 803 F.2d 896 (7th Cir. 1986). Similarly, in cases under 28 U.S.C. §2254, "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). See also *Gilmore v. Taylor*, 508 U.S. 333, 342, 344 (1993); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Likewise with errors of federal law. See *United States v. Caceres*, 440 U.S. 741, 752 (1979) (error "by an executive agency in interpreting its own regulations surely does not raise any constitutional concerns"); *Czerkies*, 73 F.3d at 1443 ("The government does not violate the Constitution every time it mistakenly denies a claim for benefits."). As a practical

matter, the right to obtain review, in any court, on the theories our petitioners advance is gone. That is the point of the legislation. Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals.

Although 28 U.S.C. §2241 offers an opportunity for collateral attack more expansive than the Great Writ preserved in the constitution, see *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), none of the petitioners has a claim that would be viable under *Accardi*. The immigration judge and the BIA adjudicated all four cases; one should not confuse claims of error (which these four aliens make) with claims that the Attorney General refused to acknowledge the existence of a discretionary power, as in *Accardi*. What is more, effective April 1, 1997, §306(a) of the IIRA abolishes even review under §2241, leaving only the constitutional writ, unaided by statute. This provision, to be codified at 8 U.S.C. §1252(g), reads:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

For our petitioners, then, the only plausible avenue of review comes via §106(a). We must decide whether Congress can foreclose that opportunity.

Just as the Supreme Court many years ago held that an error of law does not support a writ of habeas corpus, so it held that aliens who have lawfully entered the United States are entitled to due process of law before they may be deported or removed.

Landon v. Plasencia, 459 U.S. 21, 32-33 (1982) (citing many earlier cases). But nothing in the AEDPA permits ejection by summary proceedings. An alien is entitled to notice of the charges, to present evidence (and confront adverse evidence), with the assistance of counsel, at an evidentiary hearing before an immigration judge, and to appellate review. At the hearing, the burden is on the INS to prove by "clear, unequivocal, and convincing" evidence that the alien is deportable. *Woodby v. INS*, 385 U.S. 276, 286 (1966). The fundamental obligations the due process clause places on the government--notice and an opportunity to be heard--have been preserved. See 8 U.S.C. §§1252(b), 1252a, 1252b; 8 C.F.R. Part 242. Persons claiming to be citizens are entitled to even more: colorable claims of citizenship must be resolved, in the first instance, by a court rather than an agency. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Congress has preserved the judicial role established by *Ng Fung Ho*. See 8 U.S.C. §1105a(a)(5). (The AEDPA does not affect this statute; the IIRA replaces it with a functionally identical provision.) Petitioners do not contend that any of these adjudicatory procedures is constitutionally deficient. *Cf. Johnson v. Robison*, 415 U.S. 361, 366-74 (1974); *Traynor v. Turnage*, 485 U.S. 535, 541-45 (1988); *Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988) (en banc). Moreover, the amended §106(a)(10), as we construed it in Part III of this opinion, preserves an independent judicial role in determining whether the alien is deportable. It is only *after* a person has been determined, by agency and court in concert, to be (i) an alien who is (ii) deportable (iii) by reason of serious crimes that jurisdiction ends. Unless the Constitution bestows a right to have Article III judges review an executive decision to implement an established right to deport an alien, §106(a)(10) must be respected.

Due process requires more as the stakes, and therefore the costs of error, rise. *Mathews v. Eldridge*, 424 U.S. 319, 335

(1976). Procedures adequate to adjudicate a parking ticket, see *Van Harken v. Chicago*, 103 F.3d 1346 (7th Cir. 1997), would not be adequate to adjudicate a claim of right to remain in the United States. For reasons we have already given, however, aliens receive ample protection--trial-type hearings, administrative appeals, and review in an Article III court--of any claim of *right* to remain in this country. They receive the process that the Constitution requires, see *Landon*, 459 U.S. at 33, and more besides.

All that remains is petitioners' claim that, despite committing crimes that justify deportation, their transgressions should be excused. Does this require an additional layer of review? This question, too, has an answer given by the Supreme Court long ago. "The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'. . . No judicial review is guaranteed by the Constitution." *Carlson v. Landon*, 342 U.S. 524, 537 & n.28 (1952) (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290-91 (1904), and three other cases); see also *Ng Fung Ho*, 259 U.S. at 280 (Congress may decline to provide judicial review of aliens' contentions); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("Although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts . . ., yet Congress might intrust the final determination of those facts to an executive officer, and . . ., if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency.") These cases are congruent with more recent decisions holding that Congress need not provide judicial review of discretionary administrative dispositions. *E.g.*, *Webster v. Doe*, 486 U.S.

592, 601 (1988) (discretionary decision to discharge employee); *United States v. Erika, Inc.*, 456 U.S. 201, 206-208 (1982) (determination of right to Medicare Part B payments); *United States v. Fausto*, 484 U.S. 439 (1988) (determination that untenured federal employees will be discharged). See also *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

Article III does not add anything to an argument based on the due process clause. The power to establish the inferior federal courts under Article III §1 permits Congress to determine their jurisdiction. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 67 (1982) (opinion of Brennan, J.); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). For the first century of the nation's existence, the inferior courts lacked federal-question jurisdiction; until 1976 the federal-question jurisdiction was restricted by an amount-in-controversy requirement; many potential federal claims remain outside the jurisdiction of the inferior courts, because of sovereign immunity or a statute such as 5 U.S.C. §701(a)(2) that restricts the scope of jurisdiction-granting statutes. (Section 701(a)(2) forbids review of decisions "committed to agency discretion by law"; see *Heckler v. Chaney*, 470 U.S. 821 (1985).) None of these limitations offends Article III; neither does §106(a)(10), which, functionally understood, defines a set of decisions committed to agency discretion. See *Yueh-Shaio Yang*, 117 S. Ct. at 352-53 (calling suspension of deportation an "act of grace" that like a Presidential pardon is extended in "unfettered discretion").

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), on which petitioners rely, deals with a different kind of problem: an attempt by the legislature to require a judge to decide a particular case in a particular way, as if Congress were

exercising the "judicial Power of the United States". Compare *Plaut*, 115 S. Ct. at 1452-53, with *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992). It has nothing to do with the validity of laws specifying the limits of federal jurisdiction. Unless Article III *compels* Congress to vest in the inferior federal courts as much judicial power as Article III *permits* them to possess--an inconceivable reading of the Constitution--it interposes no obstacle to the amended §106(a)(10).

Yang's order of deportation is affirmed. The other three petitioners are aliens, deportable by reason of felonies specified in §241(a)(2). Section 106(a)(10) applies to this case, forecloses judicial review, and comports with constitutional limitations on the authority of the political branches. Their petitions are accordingly dismissed for want of jurisdiction.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 14, 1997.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge

ELIZARDO TERRAZAS-GARCIA, Petitioner,	)	
No. 95-3665 v.	)	Petition for Review of an Order of the Board of Immigration Appeals
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	

DIMITRIOS KATSOULIS, Petitioner,	)	
No. 96-1824 v.	)	Petition for Review of an Order of the Board of Immigration Appeals
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	

JELICA BICANIN, Petitioner,	)	
No. 96-2044 v.	)	Petition for Review of an Order of the Board of Immigration Appeals
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	

Order

Petitioners filed a petition for rehearing and suggestion of rehearing en banc on May 2, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Flaum took no part in the consideration of the petition for rehearing en banc.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A31 329 583 - Chicago Date: March 7, 1995

In re: DIMITRIOS HARALAMBOS KATSOULIS a.k.a. Dimitri Psigogios

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa J. Palumbo, Esquire
Legal Assistance Foundation of Chicago
1661 South Blue Island Avenue
Chicago, Illinois 60608

ON BEHALF OF SERVICE: Lynn K. Hollander
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. §1251(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. In a decision dated June 21, 1994, the Immigration Judge found the respondent to be deportable on the charge set forth above, denied in the exercise of discretion his application for a waiver pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), and ordered him deported from the United States to Greece. The respondent has appealed the Immigration Judge's decision. The

appeal will be dismissed. The request for oral argument before the Board is denied.

We have reviewed the record of proceedings, the Immigration Judge's decision, and the respondent's contentions on appeal. With the proviso which follows, we find that the Immigration Judge adequately and correctly addressed the issues raised on appeal, and the conclusion that the respondent does not merit relief as a matter of discretion is affirmed based upon the reasons set forth in the Immigration Judge's decision. *See Matter of Arreguin*, Interim Decision 3247 (BIA 1995); *Matter of Burbano*, Interim Decision 3229 (BIA 1994); *Matter of Roberts*, Interim Decision 3148 (BIA 1991); *Matter of Edwards*, Interim Decision 3134 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

The respondent's chief argument on appeal is that the Immigration Judge erred by finding that he had failed to establish "a full and complete" rehabilitation. To the extent that the Immigration Judge's decision could be interpreted to mean that the respondent could not be granted section 212(c) relief unless he established rehabilitation, we now clarify that decision. A clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in section 212(c) cases involving aliens with a criminal record. *See Matter of Arreguin, supra*; *Matter of Edwards, supra*. Section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Id.* While an alien may be unable to establish convincingly that he has been rehabilitated due to the recency of his incarceration, his efforts toward rehabilitation will be considered, and he is not barred from receiving discretionary relief. *Id.*

Accordingly, any impression that the respondent here is barred from relief by a supposed failure to demonstrate that he is rehabilitated is erroneous. Rather, we have considered the respondent's efforts towards rehabilitation as one of the factors in his favor, but given his long criminal record from 1987 to 1993, his past drug use, and his past failure to complete a drug intervention program, this is not a case in which we would grant discretionary relief absent a clearer showing of rehabilitation than is present here. Because of the respondent's long history of convictions and drug use, we are not adequately convinced on the facts before us that his life of crime has stopped.

We further note that contrary to the respondent's assertion on appeal, the record does support the Immigration Judge's finding that the respondent has a 1991 conviction for possession with intent to deliver heroin as well as a 1991 conviction for possession with intent to deliver cocaine. The conviction record relating to the respondent's 1991 convictions is a multi-page document (Exh. 3). Although the convictions appear on separate pages, an examination of the complete document reflects that the respondent was convicted on April 22, 1991, of both possession with intent to distribute cocaine and possession with intent to distribute heroin.

Based on the foregoing, the appeal is hereby dismissed.

/s/

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Chicago, Illinois

File: A31 329 583 June 21, 1994

In the Matter of	)	
	)	
DIMITRIOS KATSOULIS	)	IN DEPORTATION
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 241(a)(2)(B)(i) - conviction of a controlled substance violation.

APPLICATION: Waiver of inadmissibility under Section 212(c).

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
Lisa J. Palumbo, Esq. Legal Assistance Foundation of Chicago 1661 South Blue Island Avenue Chicago, Illinois 60608	Lynn K. Hollander, Esq. General Attorney INS Chicago, Illinois

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a thirty-one year old male, native and citizen of Greece who was originally admitted to the United States as an immigrant on October 28, 1992. Proceedings were

instituted when he was served with an Order to Show Cause, charging him with deportability under the above captioned section of the Immigration and Nationality Act. The respondent, through counsel, has admitted the truthfulness of the factual allegations contained in the Order to Show Cause. Based on these admissions, deportability has thus been established by clear, convincing and unequivocal evidence. The respondent has designated Greece as the country to which deportation should be directed, should such action become necessary, but has submitted an application for a waiver of inadmissability under Section 212(c) of the Act.

A Section 212(c) waiver is available in deportation proceedings regardless of whether or not the respondent has effected a departure and entry following the conviction which rendered him excludable and deportable. Matter of Silva, 16 I&N Dec. 26 (BIA 1976), and Francis v. INS, 532 F.2d 268 (2d Circuit 1976). An applicant for this waiver must establish that he is statutorily eligible by showing that he was lawfully admitted for permanent residence and has maintained a lawful, unrelinquished domicile in the United States for seven consecutive years. Furthermore, the respondent must establish that he merits the favorable exercise of discretion.

Based upon the evidence of record, I find that the respondent has met the requirements for statutory eligibility. Thus, the only issue which must be resolved is whether he has established that the requested relief should be granted in the exercise of discretion. In making this determination, I have taken into account the factors outlined in Matter of Marin, 16 I&N Dec. 581 (BIA 1978) as well as other precedent cases from the Board of Immigration Appeals.

The respondent was born in Filiatra, Greece but emigrated to the United States as an immigrant at the age of ten. He attended one year of high school, then began employment at a

restaurant. The respondent appears to have maintained relatively full-time employment until his incarceration.

The record indicates that his first arrest was in 1987 for burglary (of an automobile). The respondent pled guilty on September 10, 1987 and was given a sentence of twenty-four months probation, as well as $200.00 restitution. The record indicates that his probation was terminated (See Exhibit 5-E).

The following year, the respondent was again arrested and charged with possession of marijuana on July 28th, 1988. The respondent again pled guilty and was given a six month term of supervision. The record seems to indicate, however, that his supervision was never terminated (See Exhibit 4).

The respondent was twice arrested in 1990. The first offense was for possession with intent to distribute cocaine. One month later, he was again arrested, this time for possession with intent to distribute heroin. The respondent's cases were combined and he pled guilty to both charges, receiving a sentence of three years probation along with a requirement to enroll in an in-patient TASC program, to be followed by a drug rehabilitation program.

The record reveals that on August 19th, 1991, the respondent was unsuccessfully discharged from TASC due to a re-arrest for possession of a controlled substance. He testified, however, that this charge was dismissed so that on September 16, 1991, his probation violation was withdrawn and probation was reinstated to include continued monitoring with TASC.

The record also reveals that on September 26th, 1991, he was referred to outpatient treatment and on December 5th, 1991, accepted for outpatient treatment but failed to appear for two sessions, as a result of which on January 16th, 1992, he was unsuccessfully discharged from the TASC program.

The following year on January 4th, 1993, the respondent was convicted of possession of a controlled substance (cocaine) for which he was sentenced to three years incarceration (with credit for approximately four months time served). The respondent served an additional eight months in jail and was released on parole (which, he testified, is due to expire in August 1994).

The need to show unusual or outstanding equities may be mandated because of a single serious crime or because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988).

Here, due to the respondent's rather lengthy criminal record and his convictions for possession with intent to distribute both cocaine and heroin. I find that a showing of unusual or outstanding equities is required.

The respondent has presented several factors which either individually or cumulatively could be considered unusual or outstanding:

1. The respondent has been a lawful permanent resident of twenty-two years, beginning at age ten.

2. Family ties - most of the respondent's immediate family resides in the United States. His parents are lawful permanent residents, as are two of his sisters, Virginia and Maria. His remaining sisters, Sophia and Peggy, are both United States citizens, although Sophia and her family have been living on a small farm in Greece for the last three and one-half years. The respondent also resides with his girlfriend of five years, Lina Arzuagas, although she testified that they do not intend to marry presently.

3. Hardship - the record indicates that respondent's parents are both in poor health, his father having recently undergone a

double heart by-pass operation and his mother having suffered numerous nervous breakdowns since 1982 for which she has been hospitalized and is required to take medication. In view of his family attachments to the Chicago area, it appears that there could be a fairly significant degree of emotional hardship to him and to them if he were deported, as well as some degree of hardship to the respondent himself upon his return to Greece.

An applicant for relief under Section 212(c) who demonstrates unusual or outstanding equities merely satisfies the threshold test for having a favorable exercise of discretion considered in his case. Such a showing does not compel that discretionary necessarily be exercised in his favor. Matter of Buscemi, supra.

Here, the determinative factor is rehabilitation which is one of the favorable considerations in the discretionary evaluation with respect to Section 212(c) relief. Although rehabilitation is not necessarily an absolute prerequisite, an applicant for relief with a criminal record will ordinarily be required to make such a showing. Matter of Buscemi, supra.

The respondent testisfied that while incarcerated, he attended a substance abuse program for three months, as well as GED classes. He also stated that he was granted an early release for good behavior and that he has incurred no parole violations since that time. Lastly, he and his witnesses assert that since his release, he has maintained full-time employment and has adopted a more responsible attitude.

While the record suggests that the respondent's prison experiences may have had a sobering effect on him, I cannot find sufficient evidence to conclude that he has yet accomplished a full and complete rehabilitation. He has not provided any independent evidence supporting his assertions that he has remained drug free since his release, or that he has taken remedial action to prevent a future occurrence. This is

significant in view of his girlfriend's testimony that he had ceased his drug use several times previously and even attended drug intervention programs, all without apparent success.

The record also reveals that he has previously been diagnosed as a drug addict, that supervision as a result of his possession of marijuana charge in 1988 was never terminated, and that he was unsuccessfully discharged from the TASC program in January 1992 as a consequence of his failure to attend the prescribed sessions.

Thus, upon careful consideration of all the evidence of record, I find that the favorable factors advanced by the respondent are not sufficient to outweigh the serious, adverse factors militating against a grant of relief, most significantly the lack of a showing of rehabilitation. Accordingly, the application will be denied as a matter of discretion and the following orders will be entered.

ORDER:

IT IS ORDERED that the respondent's application for a waiver of inadmissability under Section 212(c) of the Act is denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Greece on the charge contained in the Order to Show Cause.

JAMES R. FUJIMOTO
Immigration Judge

Article III Of The United States Constitution

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

(2)

FILED

NOV 18 1997

CLERK

No. 97-279

In the Supreme Court of the United States

OCTOBER TERM, 1997

DIMITRIOS KATSOULIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
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30pp

QUESTIONS PRESENTED

1. Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which precludes judicial review of final orders of deportation entered against aliens who have been convicted of certain serious crimes, divested the courts of appeals of jurisdiction over a petition for review that was pending at the time of AEDPA's enactment.

2. Whether deportation of petitioner without additional judicial review would violate the Due Process Clause, separation-of-powers principles, or the Suspension Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-279

DIMITRIOS KATSOULIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 109 F.3d 1185. The decisions of the Board of Immigration Appeals (Pet. App. 26a-28a) and the immigration judge (Pet. App. 29a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1997. A petition for rehearing was denied on May 14, 1997. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on August 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Greece, entered the United States as a lawful permanent resident in 1972. Pet. App. 29a. In 1987, petitioner was convicted of burglary of an automobile and sentenced to probation. *Id.* at 31a. In 1988, he was convicted of possession of marijuana and sentenced to supervision. *Ibid.* In 1991, petitioner accumulated two further convictions, for possession of cocaine on one occasion and possession of heroin on another, in each case with the intent to distribute the drugs; he was sentenced to probation and was required to enroll as an inpatient in a substance abuse program and thereafter to participate in a drug rehabilitation program. *Id.* at 28a, 31a. Petitioner was expelled from the inpatient program after being arrested once again for possession of a controlled substance; he was later reinstated in the program as an outpatient, but then expelled again for failure to appear for treatment on two occasions. *Id.* at 31a. In 1993, petitioner was convicted of possession of cocaine and sentenced to a term of three years in prison, of which he served approximately one year before being released on parole. *Id.* at 32a.

In June 1993, the Immigration and Naturalization Service (INS) instituted deportation proceedings against petitioner on the ground that his drug convictions made him deportable under former Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i) (Supp. IV 1992). Pet. 2; Pet. App. 29a-30a. Petitioner, through counsel, admitted all of the allegations against him and conceded his deportability. Pet. App. 30a. He applied, however, for a discretionary waiver of deportation under former Section 212(c) of the INA, 8 U.S.C.

1182(c) (Supp. IV 1992). Pet. App. 30a. An immigration judge (IJ) found that petitioner met the minimum statutory requirements to be eligible for a waiver under Section 212(c) (Pet. App. 30a), but he denied relief, as a matter of discretion, because "upon careful consideration of all the evidence of record, * * * the favorable factors advanced by [petitioner were] not sufficient to outweigh the serious, adverse factors militating against a grant of relief, most significantly the lack of a showing of rehabilitation" (*id.* at 34a). The IJ therefore ordered petitioner deported to Greece. *Ibid.*

2. Petitioner appealed the denial of discretionary relief to the Board of Immigration Appeals (BIA or Board), arguing chiefly that the IJ had erroneously required a showing of "full and complete" rehabilitation. Pet. App. 27a. In rejecting petitioner's challenge to the IJ's order, the Board made clear that there was no "absolute prerequisite" that a criminal alien make a "clear showing of reformation" in order to merit a favorable exercise of discretion under former Section 212(c). *Ibid.* On the facts of petitioner's case, however, the Board held that it had "considered [petitioner's] efforts towards rehabilitation as one of the factors in his favor," but that "given [petitioner's] long criminal record from 1987 to 1993, his past drug use, and his past failure to complete a drug intervention program," it was "not adequately convinced on the facts before [it] that [petitioner's] life of crime ha[d] stopped." *Id.* at 28a. Thus, this was "not a case in which [the Board] would grant discretionary relief absent a clearer showing of rehabilitation than [was] present here." *Ibid.*

3. The BIA's decision was entered on March 7, 1996. See Pet. 3.[1] Petitioner then sought review in the United States Court of Appeals for the Seventh Circuit, under the provision for judicial review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a) (1994).

On April 24, 1996, while the petition for review was pending, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(a) of AEDPA, 110 Stat. 1276-1277, amended what was then Section 106(a)(10) of the INA (previously codified at 8 U.S.C. 1105a(a)(10) (1994)) to provide, in pertinent part:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

8 U.S.C. 1105a(a)(10) (Supp. II 1996).[2] Section 440(d) of AEDPA further amended former Section 212(c) of

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[1] The date of the BIA's order is misprinted in the appendix to the petition (at 26a).

[2] Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, repealed Section 106 of the INA in its entirety and replaced it with a new Section 242, 8 U.S.C. 1252 (Supp. II 1996), which governs judicial review of what are now known as "orders of removal." That change is generally effective only with respect to administrative proceedings commenced on or after April 1, 1997. See IIRIRA §§ 306(c), 309(a) and (c), 110 Stat. 3009-612, 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657. New Section 242(a)(2)(C), 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), contains a

the INA, 8 U.S.C. 1182(c) (1994), to eliminate the Attorney General's authority to grant discretionary relief from deportation to any alien who was "deportable by reason of having committed any [such] criminal offense." 110 Stat. 1277.

The court of appeals dismissed the petition for review for lack of jurisdiction in light of AEDPA. Pet. App. 1a-23a. Because petitioner is deportable under former Section 241(a)(2)(B)(i) of the INA (previously codified at 8 U.S.C. 1251(a)(2)(B)(i) (1994)), by reason of his drug-crime convictions, the court concluded that Section 106(a)(10) of the INA, as amended by Section 440(a) of AEDPA, precludes judicial review of the final order of deportation entered against him. Pet. App. 8a-11a, 23a. Agreeing with "[e]very court of appeals that has considered the question," the court held that because Section 440(a) "curtails the jurisdiction of the courts it is presumptively effective on enactment." *Id.* at 8a. The court noted that its earlier decision in *Reyes-Hernandez* v. *INS*, 89 F.3d 490 (1996), which expressed concern about aliens who might have waived "colorable defense[s]" to deportability in the expectation that they could obtain judicial review if their claims for discretionary relief were denied, could have no application in this case, because petitioner "concede[d] that [he] lack[ed] a colorable defense to deportation." Pet. App. 10a.

The court rejected petitioner's claims of constitutional entitlement to judicial review. Pet. App. 17a-23a. First, the court stated that petitioner had no constitutional (or statutory) right to seek a writ of

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review-preclusion provision similar to that in former Section 106(a)(10).

habeas corpus for the purpose of securing "review of discretionary decisions by the political branches of government." *Id.* at 18a-19a. Moreover, although "aliens who have lawfully entered the United States are entitled to due process of law before they may be deported" (*id.* at 19a), the court held that the administrative procedures afforded under the INA, together with the opportunity to challenge, in the court of appeals, any failure to satisfy the requirements for preclusion of review under the amended Section 106(a)(10) (*i.e.*, that the subject of the proceedings be "(i) an alien who is (ii) deportable (iii) by reason of [having committed specified] serious crimes," *id.* at 20a), provided petitioner with "the process that the Constitution requires, and more besides" (*id.* at 21a) (citation omitted). Finally, the court rejected petitioner's argument based on separation-of-powers principles, because "[u]nless Article III *compels* Congress to vest in the inferior federal courts as much judicial power as Article III *permits* them to possess—an inconceivable reading of the Constitution—it interposes no obstacle to the amended § 106(a)(10)." *Id.* at 23a.

ARGUMENT

1. Petitioner argues (Pet. 8-13) that the court of appeals erred in holding that Section 440(a) of AEDPA divested it of jurisdiction over his petition for judicial review, which was pending at the time AEDPA was enacted. This Court has recently denied review in five cases raising the same issue. See *Santos* v. *INS*, No. 96-8501 (Oct. 6, 1997); *Salazar-Haro* v. *INS*, 117 S. Ct. 1842 (1997); *Uwagbale* v. *INS*, 117 S. Ct. 1338 (1997); *Chamorro-Torres* v. *INS*, 117 S. Ct. 1106 (1997); *Mendez-Rosas* v. *INS*, 117 S. Ct.

694 (1997); see also *Qasguargis* v. *INS*, 117 S. Ct. 1080 (1997). There is no reason for a different result here.

a. We note at the outset that petitioner's request for judicial review of the BIA's order is effectively moot, because the Attorney General no longer has the authority to grant the relief that petitioner seeks—a waiver of deportation under former Section 212(c) of the INA. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 212(c) to exclude from the scope of its discretionary waiver provision "an[y] alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2) * * * (B)" of the INA (previously codified at 8 U.S.C. 1251(a)(2)(B) (1994)). Petitioner conceded before the immigration judge (Pet. App. 30a) that he has been convicted of several drug crimes, each of which is a violation "relating to a controlled substance" that is "covered in" Section 241(a)(2)(B). Thus, petitioner is no longer statutorily eligible for the discretionary relief that he seeks through this proceeding.[3]

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[3] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, repealed Section 212(c) in its entirety and replaced it with Section 240A of the INA, 8 U.S.C. 1229b (Supp. II 1996), which authorizes a new form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597. With certain limited exceptions not applicable here, IIRIRA's provisions respecting cancellation of removal apply only to administrative proceedings initiated on or after April 1, 1997. See note 2, *supra*. In any event, petitioner's 1991 drug-trafficking convictions would make him ineligible for relief under the new provisions. See INA §§ 101(a)(43)(B), 240A(a)(3) (as amended by IIRIRA), 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3) (1994 & Supp. II 1996).

AEDPA does not specify whether Section 440(d) bars the Attorney General from acting on a petition for relief under former Section 212(c) filed by a criminal alien on or before the date of AEDPA's enactment. In a case referred to her by the BIA under 8 C.F.R. 3.1(h)(iii), however, the Attorney General concluded that the amendments made by Section 440(d) apply to cases that were pending before the Executive Office for Immigration Review on the date of enactment. *In re Soriano*, BIA Int. Dec. No. 3289, 1997 WL 159795 (Feb. 21, 1997).[4] Discretionary relief under the immigration laws is prospective in nature, and Section 440(d) limits the Attorney General's power to confer such relief. *Ibid.*[5] Because

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[4] We lodged a copy of the Attorney General's opinion in *In re Soriano* with the Clerk of this Court at the time we filed our brief in opposition to the certiorari petition in No. 96-1310, *Salazar-Haro* v. *INS*, cert. denied, 117 S. Ct. 1842 (1997). See also the government's supplemental brief (at 15-19) filed in response to the Court's order of September 5, 1996 (117 S. Ct. 28) in *INS* v. *Elramly*, No. 95-939, vacated and remanded, 117 S. Ct. 31 (1996).

[5] See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future."); see also *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) ("Like statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact."). Moreover, just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994), the repeal of Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any "right" of an alien to obtain such relief. The principles underlying the present application of jurisdictional rules to pending cases, discussed below, thus apply equally to cases involving the Attorney General's power

the Attorney General lacks any authority under current law to grant petitioner's request for a waiver of deportation under Section 212(c), even a judicial reversal of the BIA's previous discretionary decision to deny relief could not avail petitioner now.[6]

b. The court of appeals correctly concluded (Pet. App. 8a-11a) that Section 440(a) of AEDPA operated immediately upon its enactment to divest the court of jurisdiction to review petitioner's pending case. In *Landgraf* v. *USI Film Products*, 511 U.S. 244, 273 (1994), this Court explained that "application of new statutes passed after the events in suit is unquestion-

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to act. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the class of aliens eligible for Section 212(c) relief "speak only to the power of a public agency.").

[6] We also note that, so far as we are aware, the final order of deportation outstanding against petitioner is not presently subject to any judicial or administrative stay. We are informed by the INS that petitioner was ordered to report for deportation on August 14, 1997, but that on August 7 he asked the INS to allow him to "self-deport." The INS consented. When petitioner evidently failed to leave the country, the INS again ordered him to report for deportation, this time on September 9. Petitioner failed to report. If the INS locates and deports petitioner, no court will have jurisdiction to conduct any further review of the proceedings that resulted in the order of deportation. 8 U.S.C. 1105a(c) (1994) (still applicable to this case under IIRIRA § 309(c)(1)(B), 110 Stat. 3009-625); *Stone* v. *INS*, 514 U.S. 386, 399 (1995) ("Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity."). Petitioner's failure to comply with the terms of the deportation order, without seeking a further stay, may also affect the propriety of according him discretionary review in this Court. Cf. *Degen* v. *United States*, 116 S. Ct. 1777, 1781 (1996) (discussing fugitive disentitlement doctrine).

ably proper in many situations." In particular, the Court noted that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. A new law "normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Ibid.*[7]

Landgraf reaffirmed the long-standing principle that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (citing *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Gwin* v. *United States*, 184 U.S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U.S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit." *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 390 (1953). Accord *The Assessors* v. *Osbornes*, 76 U.S.

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[7] Accord *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgments) ("Our jurisdiction cases are explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").

(9 Wall.) 567, 575 (1870); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1867).

No provision of AEDPA preserves the jurisdiction of the courts of appeals over petitions for review that were pending at the time of its enactment.[8] Accordingly, Section 440(a) operated immediately to eliminate that jurisdiction. Although the dismissal of pending petitions may disappoint litigants who anticipated a further level of review, cf. Pet. 24, a new provision is not impermissible "merely because it * * * upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Like other new jurisdictional provisions, Section 440(a) speaks immediately and prospectively to deny courts the power to review final orders of deportation entered against aliens who are deportable because they have been convicted of drug-related offenses. *Id.* at 274.

The court of appeals' conclusion in this case is consistent with the decisions of the nine other courts of appeals that have considered the issue, all of which have dismissed similar petitions that were pending before them at the time of AEDPA's enactment. See *Mendez-Morales* v. *INS*, 119 F.3d 738 (8th Cir. 1997); *Fernandez* v. *INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Figueroa-Rubio* v. *INS*, 108 F.3d 110 (6th Cir.

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[8] Section 440(f) of AEDPA provides that the amendments made by Section 440(e) (relating to modifications made to the definition of "aggravated felony") "apply to convictions entered on or after the date of [enactment]." 110 Stat. 1278. There is no provision regarding the effective date of other subsections of Section 440, however, and provisions relating to various other sections provide no reliable indication of Congress's intent in that regard. See *Duldulao* v. *INS*, 90 F.3d 396, 398 n.2 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 675 & n.4 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

1997); *Boston-Bollers* v. *INS*, 106 F.3d 352, 354-355 (11th Cir. 1997); *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

c. Petitioner argues (Pet. 9-13) that this Court should grant the petition, vacate the decision below, and remand this case to the court of appeals for reconsideration in light of this Court's decisions in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), and *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). The Seventh Circuit has, however, recently rejected the argument that petitioner would make to that court on remand, concluding (in a case argued by petitioner's counsel of record, but not decided until the day the petition in this case was filed) that the decisions in *Hughes* and *Lindh* "do not affect [its] conclusion that § 440(a) applies to pending cases." *Turkhan* v. *INS*, 123 F.3d 487, 488 n.3 (7th Cir. 1997). There is therefore no reason to direct the court of appeals to revisit the issue in the present case.

In any event, nothing in the decision below is inconsistent with *Hughes* or *Lindh*. As the Seventh Circuit pointed out in *Turkhan*, 123 F.3d at 488 n.3, *Hughes* "tells us only that statutes creating new causes of action—even though phrased in jurisdictional terms—can have prohibited retroactive effects." Thus, in *Hughes*, the Court held that the new statutory provision at issue "eliminate[d] a defense to a *qui tam* suit * * * and therefore change[d] the substance of the existing cause of action." 117 S.

Ct. at 1877. Section 440(a)'s amendment to Section 106(a)(10) of the INA, by contrast, neither varies any statutory standard regarding eligibility for discretionary relief from deportation nor directs any change in the way the Attorney General exercises her statutory discretion in granting or denying such relief; it merely strips courts of any ability to review the exercise of that discretion in a limited class of cases involving aliens who are deportable because they have been convicted of certain serious crimes. The new provision at issue here therefore affects only the amount (one appeal or two) and type (administrative or judicial) of review available to petitioner, not the substantive standards applicable to his request for discretionary administrative relief. Such a provision "merely allocate[s] jurisdiction among fora," thus regulating "the secondary conduct of litigation and not the underlying primary conduct of the parties"; it is precisely the sort of "jurisdiction-allocating statute[]" that courts "often apply * * * to pending cases." *Id.* at 1878; see *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916) (provision divesting courts of jurisdiction and committing certain land claims to "final and conclusive" decision by Secretary of the Interior "takes away no substantive right but simply changes the tribunal that is to hear the case").[9]

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[9] Petitioner argues (Pet. 11) that Section 440(a) is impermissibly retroactive because it "divests *all courts* of jurisdiction to review final orders of deportation subject to its terms, thus impacting the substantive ability of aliens to seek relief against unlawful orders of deportation." The Court's analysis in *Hughes* does not turn on whether a provision allocates jurisdiction between judicial fora or between a judicial forum and an administrative one. Compare *Hallowell*, 239 U.S. at 508-

Petitioner's reliance on *Lindh* is equally misplaced. The Court in that case found no reason to resort to general principles governing the prospective or retroactive application of statutes (see 117 S. Ct. at 2062-2063), because a thorough contextual analysis of the statute at issue (*id.* at 2063-2068) "reveal[ed] Congress's intent to apply the amendments [in question] only to such cases as were filed after the statute's enactment" (*id.* at 2063). In conducting that analysis, the Court focused solely on the provisions of Title I of AEDPA, which it expressly noted (*id.* at 2063) "stands more or less independent of the Act's other titles"—including Title IV, which contains Section 440(a). The courts of appeals that have considered Title IV of AEDPA, in the context of claims like petitioner's, have concluded that its provisions yield no specific textual indication of Congress's intent with regard to the effective date of Section 440(a). See *Turkhan*, 123 F.3d at 488 n.3; *Mendez-Morales*, 119 F.3d at 739 n.1 (the "drafting peculiarities of Title I" are irrelevant in

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509. Even if it did, however, this case presents no question concerning judicial review of "unlawful" deportation orders. The court of appeals held that new Section 106(a)(10) permits judicial review of whether an individual who has been ordered deported is properly subject to that Section's jurisdictional bar —that is, whether he or she is, in fact, "(i) an alien who is (ii) deportable (iii) by reason of [certain] serious crimes" specified in the INA. Pet. App. 20a. Petitioner himself concedes that he meets all of those conditions. See, *e.g.*, Pet. 2. Petitioner's only claim is that he is entitled to *judicial* review of a decision explicitly (and formerly) committed, by Congress, to the administrative discretion of the Attorney General. See 8 U.S.C. 1182(c) (1994); compare *INS* v. *Yang*, 117 S. Ct. 350 (1996). That claim does not relate to petitioner's "substantive ability * * * to seek relief" from an "unlawful" order.

determining the intended reach of Section 440); *Hernandez-Rodriguez* v. *Pasquarell*, 118 F.3d 1034, 1046 (5th Cir. 1997); *Duldulao*, 90 F.3d at 398 n.2; *Mendez-Rosas*, 87 F.3d at 675 & n.4. They have therefore properly applied the general principles regarding temporal reach articulated in *Landgraf* and recognized, but found inapplicable, in *Lindh* (see 117 S. Ct. at 2062-2063).

d. The particular statutory issue that petitioner seeks to raise affects only a limited and rapidly diminishing class of cases in which petitions for judicial review brought by alien felons were pending before the courts of appeals when the AEDPA was enacted in April, 1996. Moreover, as noted above (see note 3, *supra*), Congress has comprehensively revised the entire statutory framework relating to discretionary relief from deportation, with general effect as of April 1, 1997. The question whether Section 440(a)'s amendment of Section 106(a)(10) of the INA—a provision that has now been repealed in its entirety (see note 2, *supra*)—was or was not immediately effective is therefore of little continuing importance. For that reason, and in light of the unanimity of the ten courts of appeals that have addressed the question, review by this Court is not warranted.

2. Petitioner argues further (Pet. 13-30) that Section 440(a)'s provisions restricting judicial review of final deportation orders entered against criminal aliens deny him due process, contravene constitutional separation-of-powers principles, and violate the Suspension Clause. None of those claims warrants review in this case.

a. Petitioner has not been denied due process. He does not contend, for instance, that he was not given

adequate notice of the proceedings against him, or of the grounds on which the INS sought to deport him. Nor does he complain of any procedural flaw in the conduct of his deportation hearing, during which he was represented by counsel (see Pet. App. 30a), or in the review he received on the merits from the Board of Immigration Appeals. Nor, indeed, does he argue that there is any ground for questioning the immigration judge's conclusion (based on petitioner's own concession) that he is legally deportable. See *ibid.*[10] Petitioner's only substantive contention is that the IJ or the BIA, acting on behalf of the Attorney General, should, on the particular facts of petitioner's case, have afforded him discretionary relief from the deportation that his previous misconduct otherwise required; and his only "due process" claim is that he was constitutionally entitled to judicial review of their contrary discretionary judgment.

That claim is unavailing. As the court of appeals recognized, the Constitution does not require judicial

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[10] Even if petitioner were in a position to assert the rights of a criminal alien with a colorable defense to deportability (which he is not), this case would not present that issue. The court of appeals made clear (Pet. App. 11a-13a, 20a) that it reserved the right to review whether or not the party seeking review was, in fact, an alien who was deportable by reason of having committed certain specified crimes, in order to satisfy itself that Section 106(a)(10) was being properly applied in a particular case. Petitioner received no such review because he conceded alienage, deportability, and the relevant criminal history. *Id.* at 30a. Although petitioner alleges a conflict in the lower courts on that issue (Pet. 14), any such disagreement would not warrant review in petitioner's case, where the court of appeals stood ready to review both deportability and the substance of petitioner's criminal history had petitioner not conceded both points.

review of discretionary administrative decisions of the sort involved here—particularly because they do not, by definition, involve legal entitlements or fundamental rights, but only choices concerning whether particular aliens, unquestionably subject to deportation, nonetheless merit some unusual degree of executive forbearance. See Pet. App. 21a-22a; *Ortwein* v. *Schwab*, 410 U.S. 656, 658-660 (1973) (per curiam) (no due process right to judicial review of administrative benefits determination); *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 280 (1922); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893); see generally *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952).

At most, this Court has recognized that a "serious constitutional question" might arise "if a federal statute were construed to deny any judicial forum for a *colorable constitutional claim*." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (emphasis added). Petitioner, by contrast, alleges no more than that the immigration judge and the BIA resolved against him a perhaps debatable question of personal character, and therefore denied him discretionary relief from an order of deportation that he concedes is legally authorized. See Pet. App. 27a-28a, 30a, 33a-34a.[11] That fact-bound,

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[11] Given the non-constitutional nature of petitioner's underlying challenge to the IJ's and the BIA's discretionary decision,

non-constitutional claim does not engage even the tentative concern expressed in *Webster*, and the question whether petitioner was constitutionally entitled to a judicial forum in which to raise it does not merit this Court's review.

b. Petitioner contends (Pet. 22-27) that denying the courts jurisdiction to review challenges brought by deportable alien felons to administrative denials of discretionary relief from deportation threatens "the structural integrity of our tripartite form of government" (Pet. 23). That claim is not well founded.

The Constitution vests "[t]he judicial Power of the United States" in this Court and in "such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. It does not follow, however, that the federal courts—in particular, those "inferior Courts" established by Congress, rather than by the Constitution itself—are automatically seized of jurisdiction over every issue to which the judicial power might constitutionally extend. To the contrary, as the court of appeals recognized, "[t]he power to establish the inferior federal courts * * * permits Congress to determine their jurisdiction." Pet. App. 22a (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982) (opinion of Brennan, J.), and *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.)

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the academic debate petitioner describes (Pet. 13-15) concerning judicial review of administrative decisions that "implicat[e] fundamental rights" (Pet. 13, quoting *Superintendent* v. *Hill*, 472 U.S. 445, 450 (1985)) is irrelevant here. The specific decisional conflicts that petitioner alleges (Pet. 14-15) are similarly irrelevant to this case. See note 10, *supra*, and pages 22-23 & note 15, *infra*.

272, 284 (1856)); see, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993); *Finley* v. *United States*, 490 U.S. 545, 547-548 (1989); *Hallowell*, 239 U.S. at 509. In particular, as relevant here, "there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284) (emphasis added in *Northern Pipeline*).

The "public-rights doctrine * * * draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.); see also *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). It extends to "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" and to "matters that historically could have been determined exclusively by those departments." *Northern Pipeline*, 458 U.S. at 67-68 (opinion of Brennan, J.) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932)). In that regard, Congress's plenary authority over matters respecting immigration, and its vesting of adjudicatory authority over such matters in administrative agencies, are paradigmatic. *Northern Pipeline*, 458 U.S. at 69 n.22 (opinion of Brennan, J.) (quoting *Crowell*, 285 U.S. at 51); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 967

(1988) ("[B]ecause of the longstanding assumption that the executive and legislative branches possess plenary power over immigration issues, the surrounding body of law falls within the public rights category.") (footnote omitted).

So far as Article III is concerned, then, Congress is generally free to provide as much or as little judicial review of administrative decisions in immigration proceedings (including exclusion, deportation, admission, or removal proceedings) as it deems appropriate, including no review at all. Whatever limits, if any, there may be to that proposition, this case does not test them. Petitioner conceded deportability, and he contests only the decision made, on the facts of his case, not to accord him a form of administrative "grace" that Congress formerly permitted to be offered to worthy individuals "*in the discretion of the Attorney General.*" 8 U.S.C. 1182(c) (1994) (emphasis added); see *INS* v. *Yang*, 117 S. Ct. 350, 352 (1996); compare, *e.g.*, the cases cited at Pet. App. 21a-22a; 5 U.S.C. 701(a)(2) (excepting from review under the Administrative Procedure Act those actions that are "committed to agency discretion by law").[12] There is

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[12] We pause to note again that Congress has since forbidden the Attorney General to exercise such discretion in favor of *any* alien with a criminal history like petitioner's. See page 7 & note 3, *supra*. It seems pertinent to point out that an insistence on the constitutional necessity of multiple layers of review, judicial or otherwise, of decisions that Congress has clearly designated as discretionary may not redound to the overall or long-term benefit of the class of persons potentially eligible for relief. Rather, Congress's response may be simply to eliminate the discretion, in order to obviate the need for review. See, *e.g.*, S. Rep. No. 48, 104th Cong., 1st Sess. 3, 26 (1995) (noting that the deportation process for criminal aliens had become "byzantine" and that "[t]here is little reason for the

little doubt that the immigration judge and the BIA acted properly, on behalf of the Attorney General, in denying discretionary relief to petitioner on the facts of this case (see Pet. App. 26a-34a); but even if they had not, nothing in Article III of the Constitution would entitle petitioner to seek further review of that discretionary decision in court.

c. Finally, petitioner questions (Pet. 27-29) the court of appeals' observations (Pet. App. 18a-19a) concerning the availability of habeas corpus proceedings to seek review of administrative decisions to deny discretionary relief from deportation. The court, however, discussed the availability of habeas corpus relief only in the process of framing the quite different question presented by this case.

As the opinion below notes (Pet. App. 17a), some other courts of appeals, while upholding Congress's prerogative to deny ordinary judicial review procedures to deportable aliens with criminal records like petitioner's, have "observe[d] that limited opportunity to apply for a writ of habeas corpus may remain."[13] The court in this case, however, was "reluctant to place weight" (*id.* at 18a) on the potential

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multiple levels of appeal and delay in the deportation process which current law permits").

[13] See *Kolster*, 101 F.3d at 790 ("any habeas review that is required by the Constitution remains available"); *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31 (expressing "no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 400 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it.") (citations omitted).

availability of the limited form of review that might be available through the non-statutory writ of habeas corpus protected from suspension by the Constitution (Art. I, § 9, Cl. 2), because in the court's view that writ would not lie to correct the sort of non-constitutional error, involving only "discretionary decisions by the political branches of government" (Pet. App. 18a), that petitioner alleges here. Similarly, the court declined to rely on the possibility that petitioner could obtain review under 28 U.S.C. 2241, both because that form of habeas, although broader than the constitutional minimum, also would not provide relief for the sort of error claimed by petitioner, and because the use of Section 2241 to seek review of deportation or removal proceedings has now been foreclosed by statute. Pet. App. 19a; see 8 U.S.C. 1252(g) (Supp. II 1996).[14]

The court of appeals was therefore willing to assume, for purposes of deciding this case, that if it applied Section 440(a)'s review-preclusion provision in accordance with its terms, then "[a]s a practical matter, the right to obtain review, in any court, on the theories [this] petitioner[] advance[s] is gone." Pet. App. 18a-19a. That assumption focused and, if anything, strengthened petitioner's claim that statutory (non-habeas) review could not constitutionally be foreclosed. Putting the court's statement in context also makes clear, however, that it is only petitioner's claim to statutory review, under former Section 106

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[14] The Seventh Circuit has made clear, in this and other cases, that, in its view, some form of habeas corpus review remains available for substantial constitutional claims. See Pet. App. 18a-19a; *Chow* v. *INS*, 113 F.3d 659, 668-669 (1997); *Turkhan*, 123 F.3d at 490.

of the INA (8 U.S.C. 1105a (1994), that is at issue here. Petitioner did not seek a writ of habeas corpus, either under 28 U.S.C. 2241 or directly under the Constitution, and his present claim that the court of appeals incorrectly described the availability of review in such a proceeding is no ground for further review in this case.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] For the same reason, petitioner's claim (Pet. 15-16) of conflict among the courts of appeals concerning the availability and scope of habeas corpus review is irrelevant to this case.